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Falling from the Legislative Grace: The Acorn Defunding and the Proposed Restraint of Congress' Appropriations Power Through the Bill of Attainder Clause

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Falling from the Legislative Grace: The Acorn Defunding and the
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COMMENTS

FALLING FROM THE LEGISLATIVE GRACE: THE ACORN DEFUNDING AND THE PROPOSED RESTRAINT OF CONGRESS’ APPROPRIATIONS POWER THROUGH THE BILL OF ATTAINDER CLAUSE

ANDREW KIM*

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INTRODUCTION

It all started with a pimp and a prostitute—or, at least, two individuals posing as such.¹ The duo walked into the field office of a fair housing organization, openly seeking funding to operate a brothel.² The organization, one reliant on congressional funding, listened to the duo’s inquiry and seemingly assisted the couple in achieving their illicit activity; the exchange was caught on videotape.³

The two were hardly hustler and harlot; rather, they were political activists seeking to bring the organization down through a self-inspired sting operation.⁴ With some creative editing and distribution to the media, the duo’s video spread like wildfire, implicating the organization as a willing accomplice to criminal activity.⁵ In the wake of public furor, Congress passed legislation wholly denying federal funding to the group.⁶ Financially incapacitated, the organization sought any means to recover its lost funding. It brought suit against the United States through an oddly

1. See *ACORN Workers Caught on Tape Allegedly Advising on Prostitution*, CNN POLITICS (Sept. 11, 2009, 10:21 AM), <http://www.cnn.com/2009/POLITICS/09/10/acorn.prostitution/> (summarizing the events of a sting operation against a fair housing public interest organization, the Association of Community Organizations for Reform Now, also known as ACORN). The events described here, leading to the congressional ban on appropriations to ACORN, are discussed in greater detail in Part III, *infra*.

2. See *id.* (detailing James O’Keefe’s solicitation of ACORN’s Baltimore office “for advice on how to set up a prostitution ring involving more than a dozen underage girls from El Salvador”).

3. See *id.* (noting that both ACORN staffers “appear[ed] enthusiastic to help” by encouraging the supposed prostitute to “refer to herself as a ‘performing artist’ on tax forms” and also noting that the sting was caught on tape).

4. See *id.* (describing the alleged prostitute and pimp as conservative activists and exploring previous, unsuccessful attempts at filmed sting operations).

5. See *id.* (elaborating on the allegations of assisting the supposed pimp and prostitute with “setting up a prostitution ring and evading the IRS”).

6. See Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009) (prohibiting any federal funding from being appropriated to ACORN and its affiliates).

effective, yet unobvious constitutional provision: the Bill of Attainder Clause.⁷

The Bill of Attainder Clause is arguably one of the most rarely-litigated constitutional clauses in our legal history.⁸ Born out of a desire to prohibit brash punishment of Loyalist sympathizers in the aftermath of the Revolution, the Clause has since taken on several transformations in the brief appearances it has made over the last two centuries.⁹ In the past few decades, it has served as a restraint of last resort on the actions of Congress; now, it is poised to constrain the seemingly unlimited “power of the purse”—the congressional appropriations power.¹⁰

However, it remains uncertain as to whether the Bill of Attainder Clause, often perceived as a relic of history, can constitutionally restrain the power to appropriate, one of the most sacrosanct powers solely possessed by Congress.¹¹ In one of the few instances where the Bill of Attainder Clause was successfully litigated, the Supreme Court seemed to say that such constraint was lawful.¹² But in light of the divergent interpretations of the Clause and the growing number of judicial observations affirming legislative supremacy in the field of appropriations, the answer may not be so clear-cut.

This Comment argues that the Bill of Attainder Clause can almost never serve to constrain Congress’ targeted and specified withdrawal of appropriations to an organization. Part I of the Comment discusses the history of the Bill of Attainder Clause and the Appropriations Clause, and

7. See generally *ACORN v. United States (ACORN I)*, 662 F. Supp. 2d 285, 299–300 (E.D.N.Y. 2009) (enjoining the United States from enforcing the appropriations ban against ACORN on the grounds that it violated the Bill of Attainder Clause), *aff’d in part, vacated in part*, 618 F.3d 125 (2d Cir. 2010).

8. See, e.g., *R.I. Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 105 (R.I. 1995) (observing “that the bill of attainder clause is rarely used to invalidate legislation”); see generally U.S. CONST. art. I, § 9, cl. 3 (preventing the federal government from passing bills of attainder).

9. See discussion *infra* Part I.B (examining the history of the Bill of Attainder Clause and its subsequent legal evolutions).

10. See *ACORN I*, 662 F. Supp. 2d at 295 (invalidating the legislated blocking of federal funding for one identified organization via the Bill of Attainder Clause). The prohibition against bills of attainder is also imposed on the states through the Contracts Clause; any potential restraint that the Bill of Attainder Clause poses on Congress’ ability to appropriate also has implications for state legislatures. See U.S. CONST. art. I, § 10, cl. 1 (“No state shall . . . pass any Bill of Attainder . . .”); see also *Fraternal Order of Police Hobart Lodge No. 121, Inc. v. City of Hobart*, 864 F.2d 551, 556 (7th Cir. 1988) (observing that “no legislature, state or federal, may pass a bill of attainder” under the Constitution). However, for purposes of simplified discussion, this Comment will assume state-based legislative appropriations and congressional appropriations are alike; any variation in the dichotomy between the federal and state systems is outside the scope of this Comment.

11. See U.S. CONST. art. I, § 9, cl. 7 (stating that “no money shall be drawn from the Treasury” without an appropriation made by law).

12. See generally *United States v. Lovett*, 328 U.S. 303, 318 (1946) (striking down part of an appropriations bill on the grounds that it violated the Bill of Attainder Clause).

summarizes the status of both clauses in federal jurisprudence today. Part II describes the political and legal background to the litigation that brought forward an attainder challenge to the withdrawal of congressional appropriations. Part III applies the Bill of Attainder Clause to the congressional appropriations power, using both the current test and an alternative one, and gauges the validity of conceptual rationales for the Bill of Attainder Clause in light of congressional appropriations. As constitutional interpretation often yields differing viewpoints, alternative analyses of the Bill of Attainder Clause are also addressed. In light of the overextension and inefficacy of the current attainder analysis, this Comment concludes by calling for a return to the strict, narrow interpretation of the Bill of Attainder Clause in an effort to avoid a constitutional conflict with Congress' supreme appropriations power.

I. BACKGROUND

A. *A Tool of Convenience: The British Legacy of Bills of Attainder*

Bills of attainder were legislative devices that originated from the late-Medieval era English Parliaments.¹³ In modern parlance, a bill of attainder is legislation that targets individuals or easily ascertained members of a group, and inflicts upon them a designated punishment without the protections of a judicial trial.¹⁴ The date of passage of the first bill of attainder is unclear,¹⁵ but throughout the Tudor and Stuart dynasties, bills of attainder were popular in nullifying the political opposition.¹⁶ The reach of Parliament's taint ran far and wide; clergy protesting royal extravagance, traitorous soldiers, and the wives of Henry VIII all fell victim to legislative declarations of guilt.¹⁷ The "tainting" associated with attainder was from the "corruption of . . . blood" that would arise from a declaration of guilt and treason.¹⁸ As a result, the estates of the attainted dead were escheated

13. See *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984) (describing the practice of passing bills of attainder as an ancient one, originating from the English Parliament); see also Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 374 & n.130 (1978) (debating whether the exclusion of tainted male issue in a certain case during the late 1390s Parliament constituted a bill of attainder).

14. *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 722 (1951) (citing *Lovett*, 328 U.S. at 315).

15. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 68 (1999).

16. Jane Welsh, Note, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 83 & n.18 (1983).

17. LEVY, *supra* note 15, at 69.

18. Charles H. Wilson, Jr., Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CAL. L. REV. 212, 213-14 (1966). The corruption of blood meant that the heirs of the attainted dead "could not inherit and no one could inherit from him." *Id.* (citation omitted). In short, "the attainted was wiped out as if he had never been born." *Id.* at 214 (citation omitted).

back to the respective Lord or to the Crown.¹⁹ Instead of dealing with the lengthy formalities of a trial, both Parliament and the King had a convenient method of dealing with the political enemies of the Crown and country: a legislative declaration of guilt could simply be enacted to dispense with the protections and procedures of law.²⁰

Parliament also passed bills of “pains and penalties.”²¹ Such bills differed from bills of attainder in that they did not confer the highest penalty of death, but rather substituted banishment, seizure of property, imprisonment, or some other form of “lower” punishment for political treason not quite worthy of death.²² Bills of pains and penalties also carried a potentially lethal “taint”—for instance, a person who aided a guilty party in escaping legislatively imposed imprisonment or evading the authorities would be found guilty of a felony, and both the imprisoned party and the aider would be put to death for defying Parliament’s prescribed punishment.²³

Both bills of attainder and bills of pains and penalties shared four common characteristics: first, an accused identified by name; second, Parliament’s justifications for according punishment to that party; third, a declaration of guilt, oftentimes contrary to common law and made for a special purpose; and fourth, a prescription of punishment.²⁴ The fourth factor made the difference as to whether a bill was one of attainder or one “merely” of pains and penalties.²⁵

B. Prohibiting Legislative Punishment: The Beginning of an American Constitutional Tradition

English colonial settlers brought bills of attainder and bills of pains and penalties with them to the New World, but use of such bills was rare until the American Revolution. The rebelling colonies and their early state successors would use bills of attainder to escheat the property of those loyal to the Crown back to the state government.²⁶ But after the Revolution, with the inflamed passions of the war dying down, the use of

19. See WILLIAM BLACKSTONE, COMMENTARIES *252 (explaining that the “feudal covenant and mutual bond of fealty” are broken when one is guilty of legal attainder).

20. Wilson, *supra* note 18, at 214.

21. BLACKSTONE, *supra* note 19, at *256.

22. Wilson, *supra* note 18, at 214.

23. *Bills of Attainder*, 1 W. JURIST 73, 79 (1867). In addition, fleeing from imprisonment or failing to surrender after committing a felony would be “taintable” offenses, referred to as a “conditional attainder.” Berger, *supra* note 13, at 374–75.

24. *Bills of Attainder*, *supra* note 23, at 81; Wilson, *supra* note 18, at 214.

25. See Berger, *supra* note 13, at 357 (describing the “inseparable indicia” of a bill of attainder as crime, death, and corruption of blood and arguing that to have a “milder degree of punishment” would lower a bill of attainder to a bill of pains and penalties).

26. LEVY, *supra* note 15, at 71.

bills of attainder fell “rapidly into disrepute,” eventually giving birth to the federal Bill of Attainder Clause.²⁷ It was evident the Founding Fathers recognized that, had they lost the war, they would have been subject to the wrath of a parliamentary declaration of treason.²⁸

Between the Constitutional Convention and the Civil War, the Bill of Attainder Clause rarely had the chance to be litigated. In one early interpretation of the Clause, Chief Justice Marshall acknowledged, in dicta, that bills of attainder could come in many forms, with the power to “affect the life of an individual . . . confiscate his property . . . or . . . do both.”²⁹ The Chief Justice was absolute in his condemnation of such legislative abuse, proclaiming “[i]n this form, the power of the legislature over the lives and fortunes of individuals is expressly restrained.”³⁰ The revulsion that he expressed towards legislative interference with judicial functions echoed prominently in the expansive interpretations of the Bill of Attainder Clause to come.³¹

1. Crafting the expanse: the first modern, functionalist interpretation of the Bill of Attainder Clause

Almost prophetic in its dormancy, it was not until the Civil War that the Bill of Attainder Clause made its most significant impact. An uptick of loyalty oaths, prompted by concerns over lingering Confederate sentiments in a fractured Union, brought the first cases to shape the discourse of the prohibition against attainder to the Supreme Court.³²

The first modern attainder cases involved an odd pairing of groups: the Roman Catholic Church and the remnants of the Confederate States of America. In *Cummings v. Missouri*,³³ a Roman Catholic priest was jailed

27. Welsh, *supra* note 16, at 89. See generally U.S. CONST. art. I, § 9, cl. 3 (proscribing the passage of bills of attainder by Congress). From this point onward, any reference to “bills of attainder,” unless otherwise noted, will refer to both bills of attainder and bills of pains and penalties.

28. See Welsh, *supra* note 16, at 84 (suggesting the possibility that “the Framers of the American Constitution must have been extremely sensitive to the likelihood that they could have been the targets of a Parliamentary bill of attainder had America lost its war for independence”); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1344, at 217 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1891) (explaining the English use of bills of attainder during times of rebellion).

29. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810).

30. *Id.* at 138.

31. E.g., *United States v. Brown*, 381 U.S. 437, 446 (1965) (using the *Fletcher* rationale to strike down legislation on the grounds that the Framers intended to limit Congress to the “task of rule-making”).

32. E.g., *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 332 (1866) (striking down a state-mandated, anti-Confederate loyalty oath required to become a priest); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866) (prohibiting the use of an anti-Confederate loyalty oath in swearing in lawyers).

33. 71 U.S. (4 Wall.) 277 (1866).

and fined for refusing to take an oath to state and country.³⁴ Postbellum Missouri determined that those who failed to take a loyalty oath could not “be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages.”³⁵ Missouri couched its test oath as a legitimate qualification of office: a determination of “fitness or capacity . . . for a particular pursuit or profession” within the purview of the state’s police power.³⁶ A similar, congressionally-imposed loyalty oath arose in *Ex parte Garland*³⁷ where an attorney was barred from the practice of law for not first swearing under oath that he had not been an officer in the Confederate government.³⁸

Both cases were considered together, and both resulted in declarations of legislative attainder by a divided Supreme Court.³⁹ Justice Field, writing for the majority in both cases, railed against the use of the legislative power to unduly punish individuals for a legislative perception of past disloyalty.⁴⁰ In *Cummings*, the Court rejected the notion that bills of attainder, as a matter of law, had to constitute a deprivation of “life, liberty, or property, and that to take from [an individual] anything less than these is no punishment at all.”⁴¹ Justice Field wrote, “[t]he Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.”⁴² To the majority, punishment based on the *perception* of guilt, not the determination of guilt by the judiciary, was “repugnant to the true genius of the common law.”⁴³

Justice Miller, joined by Chief Justice Chase and two other justices, disagreed.⁴⁴ The dissenters emphasized a need to respect the congressional mandate; they perceived that the right to practice law, much like any other profession, was a right granted by congressional grace, subject to the

34. *Id.* at 316.

35. *Id.* at 317.

36. *Id.* at 319.

37. 71 U.S. (4 Wall.) 333 (1866).

38. *Id.* at 376–77.

39. *See Cummings*, 71 U.S. (4 Wall.) at 332 (Chase, C.J., dissenting) (explaining that *Ex parte Garland* “involved principles of a character similar to those discussed in [*Cummings*],” thus relying on the *Ex parte Garland* dissent to protest the majority’s opinion in *Cummings*).

40. *See id.* at 322 (majority opinion) (“It was against the excited action of the States . . . that the framers of the Federal Constitution intended to guard.”).

41. *Id.* at 320.

42. *Id.* at 325.

43. *Id.* at 331. This language was borrowed from Alexander Hamilton’s “A Second Letter from Phocion.” *See id.* at 330 (noting that the repugnant nature of an oath under the Bill of Attainder Clause was written about by Alexander Hamilton).

44. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 382 (1866) (Miller, J., dissenting). *Ex parte Garland* served as the consolidated dissent for both cases. *See Cummings*, 71 U.S. (4 Wall.) at 332 (Chase, C.J., dissenting) (relying on the dissent in *Ex parte Garland* to serve as the *Cummings* dissent).

whims of the legislative will.⁴⁵ Justice Miller's dissent advocated for a traditionalist view of bills of attainder; with very little American jurisprudence to go by, he turned to England's laws of attainder and found little comparison between the loyalty oaths and laws capable of tainting an individual.⁴⁶ The unconstitutional nature of a legislative act, according to Justice Miller, "should be so clear as to leave little reason for doubt."⁴⁷ The dissent's proposed test for attainder required three primary factors, none of which were present in the respective oath requirements: first, a legislative usurpation of the judicial role in determining convictions and sentences; second, the lack of any previous law to inflict the sentence and punishment; and third, an investigation into the guilt of the accused without the presence of the accused or his counsel.⁴⁸ Lacking these central elements, a vocal minority on the Court maintained that the loyalty oath requirements were indeed not bills of attainder.⁴⁹

About eighty years passed before the Supreme Court next had a major opportunity to revisit the Bill of Attainder Clause.⁵⁰ The case arose in another post-war period filled with suspicion of potential traitors to the United States: the Cold War. In *United States v. Lovett*,⁵¹ three federal employees had their salaries stripped by Congress through the Urgent Deficiency Appropriation Act of 1943,⁵² on belief that "'subversives' were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged."⁵³ The Act mandated, in pertinent part, that "[n]o part of any appropriation contained in this Act shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence"⁵⁴ Section 304 of the Act proceeded to identify Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett as three individuals who were explicitly forbidden from benefitting from the appropriations act.⁵⁵ Short of receiving juror pay or pay from service in the armed forces, the three were

45. *Ex parte Garland*, 71 U.S. (4 Wall.) at 384–85.

46. *See id.* at 385–90 (observing that, in light of the British tradition of bills of attainder, a statute without a criminal designation of punishment and lacking an infliction of punishment could "in no sense be called a bill of attainder").

47. *Id.* at 382.

48. *Id.* at 388.

49. *Id.* at 389–90.

50. *See Welsh*, *supra* note 16, at 93 (describing the evolution of the Bill of Attainder Clause post-*Cummings* and the corresponding passage of time).

51. 328 U.S. 303 (1946).

52. Pub. L. No. 78-132, § 304, 57 Stat. 431, 450 (1943).

53. *Lovett*, 328 U.S. at 308.

54. § 301, 57 Stat. at 449.

55. *Id.* § 304, at 450.

forbidden from receiving salary, refund, or reimbursement from the public treasury.⁵⁶

Section 304 was the product of fierce advocacy from the Chairman and one of the founding members of the House Committee on Un-American Activities, Representative Martin Dies, Jr.⁵⁷ On February 1, 1943, Congressman Dies launched into a diatribe on the House floor, naming thirty-nine federal government employees as “irresponsible, unrepresentative, crackpot, radical bureaucrats’ and affiliates of ‘communist front organizations.’”⁵⁸ He urged Congress to strip funding for these individuals’ salaries.⁵⁹ Congress was divided as to how to respond; some Members wanted to accept Representative Dies’ accusations as fact; others wanted to avoid the appearance of a “star chamber” approach to declaring guilt.⁶⁰ A committee inquiry subsequently took place; the congressional committee compelled testimony from several witnesses (and the deliberate exclusion of others), and found Lovett, Watson, and Dodd to be “guilty of having engaged in ‘subversive activity within the definition adopted by the Committee.’”⁶¹

Deeming section 304 unconstitutional, the Court strongly admonished the legislation as “the punishment of named individuals without a judicial trial.”⁶² The fact that Congress investigated the three individuals, deemed them guilty of “engaging in ‘subversive activities,’ defined that term for the first time, and sentenced them to perpetual exclusion from any government employment” made section 304 a classic legislative infliction of punishment that was prohibited by the Bill of Attainder Clause.⁶³ The Court then proceeded to declare section 304 unconstitutional, and effectively permitted Lovett, Watson, and Dodd to receive their rightful pay.⁶⁴ More importantly, the Court reaffirmed the earlier notions that the definition of punishment was expansive, and punishment could be legislated in many different forms.

56. *Id.*

57. *See Lovett*, 328 U.S. at 308 (examining the legislative history leading up to the passage of section 163). *See generally Dies, Martin, Jr., (1900 – 1972)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000338> (last visited Jan. 16, 2011) (explaining Martin Dies’ committee involvement in the House of Representatives, including with the Special Committee to Investigate Un-American Activities).

58. *Lovett*, 328 U.S. at 308–09.

59. *Id.* at 309.

60. *See id.* at 309–10 (exploring the legislative history behind section 304 and general congressional sentiment to the Dies accusations).

61. *Id.* at 311.

62. *Id.* at 316.

63. *Id.* at 316.

64. *Id.* at 318.

2. *True, faithful, and narrow: Justice Frankfurter and the literalist approach*

While the Court's attainer analysis in *Lovett* was fairly brief and straightforward, it was Justice Felix Frankfurter's concurring opinion that sparked a divergence in the Court's discourse on the subject. Justice Frankfurter agreed that the three individuals were owed their salary for their contributions to the federal government, but viewed the legislative ban and termination of funds as a breach of contract, not a constitutional violation.⁶⁵ Thus, section 304 merely served to impede the fulfillment of a contractual obligation between employer and employee, and was not legislative punishment as posited by the majority of the Court.⁶⁶

Justice Frankfurter was absolutely loathe to broach the constitutional issue.⁶⁷ He viewed the Bill of Attainder Clause as a specific provision designed to prohibit a "very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial."⁶⁸ The Bill of Attainder Clause, Justice Frankfurter argued, was a historical relic—a constitutionalized break from the English tradition of prescribing the judicial functions to the legislature.⁶⁹ An elemental approach to an attainer analysis was necessary; without the specification of an offense and person,⁷⁰ declaration of guilt,⁷¹ or punishment for a *past* offense,⁷² a legislative act could not be deemed a bill of attainder. Short of the narrow circumstances where these conditions were met, Justice Frankfurter believed that other constitutional

65. *See id.* at 330 ("I feel compelled to construe § 304 as did Mr. Chief Justice Whaley below whereby it merely prevented the ordinary disbursal of money to pay respondents' salaries.") (internal citations omitted).

66. *See id.* ("[Section 304] did not cut off the obligation of the Government to pay for services rendered . . .").

67. *See id.* at 319 (explaining Frankfurter's desire to "prevent a collision between Congress and Court").

68. *Id.* at 322. Frankfurter was not the first to espouse this view of the Bill of Attainder Clause; since the post-Civil War era, there had been some belief that the Bill of Attainder Clause had "an established and technical signification long before the framing and adoption of the Constitution of the United States, and was well understood by the men who framed that instrument," thus requiring all interpretations to be bound by the historical approach. *Green v. Shumway*, 39 N.Y. 418, 430–31 (1868) (Mason, J., dissenting).

69. *See Lovett*, 328 U.S. at 322 (Frankfurter, J., concurring) (calling for a literal, originalist view of the Bill of Attainder Clause). In emphasizing the literalist approach, Frankfurter refers to Timothy Farrar's *Manual of the Constitution of the United States of America*, which notes that the concept of the bill of attainder, as discussed above, was imported from England; *see id.* (internal citations omitted). Presumably, Frankfurter was thinking of Britain's long-standing model of powers, in which the supreme judicial functions were carried out by the House of Lords. *See id.*

70. *See id.* at 322–23.

71. *See id.* at 323.

72. *See id.* at 324 (connecting the prohibition against bills of attainder to the Ex Post Facto Clause of the Constitution, in that there must be punishment for a *past* offense and a true bill of attainder would double up as both a bill of attainder and an ex post facto law).

provisions, such as the Due Process Clause, more appropriately served to protect the rights of those who could not meet his rigid standards as to punishment with respect to the Bill of Attainder Clause.⁷³

Justice Frankfurter's literal, originalist approach to the Bill of Attainder Clause gained prominence throughout the Cold War era. In *American Communications Ass'n v. Douds*,⁷⁴ the Court held that a statute requiring labor unions to sign affidavits affirming that its officers were not members of the Communist Party did not constitute a bill of attainder.⁷⁵ Chief Justice Vinson, writing for the Court, emphasized that a bill must *punish* a person for *past actions*; congressional action to prevent *future* conduct, however likely and predictable that such conduct would take place, did not make a bill of attainder.⁷⁶

It was not until 1961 that Justice Frankfurter had an opportunity to fully elaborate his narrow view of the Bill of Attainder Clause. In *Communist Party v. Subversive Activities Control Board*,⁷⁷ Justice Frankfurter synthesized his controversial interpretation of the Bill of Attainder Clause.⁷⁸ Speaking for a divided Court,⁷⁹ he relied on the elemental approach he first set out in his *Lovett* concurrence.⁸⁰ The statute in question, which required all "Communist-action organization[s]" to register with the Attorney General (with criminal penalties for failing to do so),⁸¹ was missing the key element of specificity; that is, no person or organization had specifically been named by Congress for registration.⁸² Moreover, Justice Frankfurter expressed his strong distaste for judicial

73. See *id.* at 321–22 (dividing constitutional claims into two types—one involving the broad standards of fairness, such as the due process clause, and the other being a "very specific" type of constitutional provision, such as the prohibition of bills of attainder).

74. 339 U.S. 382 (1950).

75. See *id.* at 413–14 (establishing that past conduct can serve as "substantial ground" for congressional judgment with respect to "what the future conduct is likely to be").

76. See *id.* at 414 (deeming that Congress' purpose with the legislation was to "forestall future dangerous acts," thus foreclosing the notion that the statute was a bill of attainder).

77. 367 U.S. 1 (1961).

78. The controversy over which definition of attainder to accept arose in one of the next cases to appear before the Court, *United States v. Brown*. The *Brown* Court explicitly rejected the "narrow[] [and] technical" definition of attainder that Justice Frankfurter had espoused. See *United States v. Brown*, 381 U.S. 437, 442 (1965).

79. Justices Frankfurter, Clark, Harlan, Whittaker, and Stewart voted in the majority; Chief Justice Warren, as well as Justices Black, Douglas, and Brennan were in the minority. *Communist Party*, 367 U.S. at 1.

80. See *supra* notes 69–73 and accompanying text.

81. See *Communist Party*, 367 U.S. at 8, 11 (describing the provisions of the Subversive Activities Control Act and listing the criminal sanctions for failing to comply).

82. See *id.* at 86 (asserting that the specificity requirement requires a designation of particular persons). But see *id.* at 145–47 (Black, J., dissenting) (condemning the singling out of one party and deeming such legislation as a Bill of Attainder and a due process violation).

intervention; to him, legislative acts commanded the highest deference⁸³ and demanded the clearest proof of unconstitutionality.⁸⁴ Despite a clear legislative history and intent revealing that the bill was intentionally targeted to eliminate the Communist Party,⁸⁵ the Court respected Congress' abidance by its constitutional power and safeguards, and ingrained a limited interpretation of the Clause in the nation's jurisprudence.⁸⁶

3. *The swinging pendulum: the uncertain present-day status quo*

It may be tempting to conclude that *Douds* and *Communist Party* clearly broke from *Lovett* and relegated the Bill of Attainder Clause to nothing more than a historical relic. But the Court's position was far from clear; while there were two obvious perspectives on the matter, neither had a lasting majority on the Court, making the future of the Clause quite uncertain.⁸⁷

This was evidenced by the reappearance of the more expansive, functionalist approach to the Clause in *United States v. Brown*.⁸⁸ In 1959, Congress passed a statute that made it a crime for a member of the Communist Party to serve in the leadership of a labor union.⁸⁹ In striking down the statute as a bill of attainder, the Court fired back at the waning Frankfurter rationale.⁹⁰ It declared, "[t]he best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the

83. See *id.* at 86 (majority opinion) (yielding to the legislature "[s]o long as Congress acts in pursuance of its constitutional power" (citations omitted)).

84. *Id.* at 83 ("Of course, 'only the clearest proof could suffice to establish the unconstitutionality of a statute on [Bill of Attainder grounds].'" (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960))).

85. See *id.* at 84 (establishing that the legislation was passed with the objective of "expos[ing] the Communist movement and protect[ing] the public against innocent and unwitting collaboration with it" (quoting S. Rep. No. 81-2369, at 4 (1950))).

86. See *id.* at 86-88 (listing the requirements for a statute to be deemed a bill of attainder and finding that the law in question did not "offend[] the constitutional prohibition of attainder").

87. See, e.g., Wilson, *supra* note 18, at 212-13 (describing the "abrupt and emphatic departure" that *United States v. Brown*, 381 U.S. 437 (1965), caused from the "narrow and technical attainder doctrine developed in the 1950's").

88. 381 U.S. 437 (1965).

89. *Id.* at 439 n.1 (citing Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 504, 73 Stat. 519, 537 (codified as amended at 29 U.S.C. § 504 (2006))).

90. By this time, Justice Frankfurter had passed away; Justice Arthur Goldberg, who succeeded Frankfurter on the Court, voted with the majority. See, e.g., *id.* at 437. Justices White, Clark, Harlan, and Stewart maintained Frankfurter's mantle of judicial restraint, dissenting from the majority opinion and condemning the Court's "discard[ing] [of the] meticulous multifold analysis that has been deemed necessary in the past." *Id.* at 463 (White, J., dissenting). So long as a rational basis for Congress' desire to prevent future conduct existed, the dissenters argued, and the means were reasonable, the legislation could not constitute a bill of attainder. See *id.* at 478.

separation of powers.”⁹¹ Congress’ failure to use “rules of general applicability,” and its imposition of a criminal prohibition specifically targeting the Communist Party, satisfactorily constituted a bill of attainder for the Court.⁹²

Despite the need to resolve the extant vacillation between the broad functionalist approach and the narrow originalist interpretation, the two major cases decided since *Brown* have not shed much additional light. In *Nixon v. Administrator of General Services*,⁹³ the Court dealt with the Presidential Recordings and Materials Preservation Act,⁹⁴ which specifically mandated that President Nixon surrender his personal presidential papers to the Administrator of General Services (and consequently, the National Archives).⁹⁵ The Court, while recognizing that the anti-Frankfurterian approach in *Brown* and *Lovett* “unquestionably gave broad and generous meaning to the constitutional protection against bills of attainder,” nevertheless relied on the more elemental approach to the attainder doctrine, citing the lack of punitive intent and punishment on the part of Congress as reason not to declare the act a bill of attainder.⁹⁶

The *Nixon* Court was instrumental in solidifying the importance of punishment in determining whether a particular law constituted a bill of attainder. The Bill of Attainder Clause, the Court noted, was “anchor[ed] . . . to realistic conceptions of classification and punishment.”⁹⁷ Nevertheless, as specificity and classification alone “[did] not automatically offend the Bill of Attainder Clause,” the “starting point” of any attainder inquiry was whether “a form of punishment [had been] leveled against [an individual].”⁹⁸ The Court proceeded to dissect the concept of “punishment” under the Bill of Attainder Clause into three interrelated tests. One category of punishment existed if it “[fell] within the historical meaning of legislative punishment.”⁹⁹ Alternatively, punishment could also exist if a law imposed severe burdens without legitimate legislative purposes.¹⁰⁰ Finally, punishment could also be

91. *Brown*, 381 U.S. at 442 (majority opinion).

92. *See id.* at 461–62 (proscribing Congress from passing legislation specifying the people upon whom a sanction would be levied).

93. 433 U.S. 425 (1977).

94. Pub. L. No. 93-526, § 101, 88 Stat. 1695, 1695 (1974).

95. *See Nixon*, 433 U.S. at 433–34 (citing § 101, 88 Stat. at 1695) (describing the provisions within the Act that transferred lawful possession of the Nixon recordings and files to the Administrator of General Services).

96. *See id.* at 469, 474–75 (elaborating on the history of bills of attainder and noting that President Nixon could not “claim to have suffered any of these forbidden deprivations at the hands of Congress” simply by being forced to relinquish his personal papers).

97. *Id.* at 470.

98. *Id.* at 471–73.

99. *Id.* at 475.

100. *See id.* at 475–76.

present if a burden was imposed with a “legislative record [that] evince[d] a congressional intent to punish.”¹⁰¹ Failing to discern any of these criteria, the Court rejected President Nixon’s claim that the Act constituted a bill of attainder.¹⁰²

Disapproving of the majority’s rationale, the *Nixon* dissenters further muddled the opaque understanding of the Bill of Attainder Clause. To Chief Justice Burger, only two elements were necessary: first, a specific designation of a person or a group; and second, an arbitrary deprivation akin to the deprivation of employment (or property rights in general) as seen in *Cummings* and *Garland*.¹⁰³ Presidential papers, Chief Justice Burger argued, constituted property, and the deprivation of such property went to the heart of the prohibited punishment enshrined in the Bill of Attainder Clause.¹⁰⁴

Nixon, however, failed to resolve the lingering question as to whether a strict, Frankfurterian interpretation of the Clause was appropriate, or whether an expansive, functionalist approach was warranted; instead, the Court combined both the historical test and the functional test into one amalgamated analysis.¹⁰⁵ *Selective Service System v. Minnesota Public Research Group*,¹⁰⁶ also did little to clear the air. The case involved the Military Selective Service Act,¹⁰⁷ which required male citizens between the ages of eighteen and twenty-six to register with the Selective Service, the agency responsible for enacting a military draft should it be deemed necessary.¹⁰⁸ Failure to do so led to the imposition of criminal penalties, as well as preventing males that fell within this age range from qualifying for federal financial aid.¹⁰⁹ The Court declined to accept the attainder challenge, primarily on the grounds that the Act lacked specificity as to a single identifiable group: it applied to *all* qualifying male non-registrants,

101. *See id.* at 478.

102. *See id.* at 484.

103. *See id.* at 538–39 (Burger, C.J., dissenting).

104. *See id.* at 539–40 (explaining that “our constitutional tradition” has been to treat Presidential papers as the personal property of the President, thus subject to the Bill of Attainder Clause as a deprivation of property, and subsequently examining the history of Presidential papers).

105. *See id.* at 473–84 (majority opinion) (establishing the factors for analyzing a bill of attainder claim).

106. 468 U.S. 841 (1984).

107. The enforcement provisions of the Military Selective Service Act were the provisions actually at issue. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 844 (1984) (describing Congress’ enactment of the Department of Defense Authorization Act of 1983); *see also* Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1113, 96 Stat. 718, 748 (1982) (creating enforcement provisions for the Military Selective Service Act by tying federal aid to draft registration for eligible males).

108. *Selective Serv.*, 468 U.S. at 843–45.

109. *Id.* at 843–44. As it is commonly known, males outside this age range and women, as well as select others, were exempted from the requirement. *Id.* at 844 n.2.

an application too broad for what the Bill of Attainder Clause demanded.¹¹⁰ In addition, no matter how severe the denial of federal student financial aid may have been,¹¹¹ it did not constitute punishment in the historical sense, and accomplished legitimate nonpunitive legislative goals of pursuing compliance with the draft.¹¹² Moreover, the legislative history strongly supported the notion that nonpunitive goals were furthered, foreclosing the legitimacy of the attainder-based arguments.¹¹³ Thus, the enforcement provisions of the Act were deemed not to be a bill of attainder.¹¹⁴ However, while the *Selective Service* Court may have rejected the specific attainder-based arguments presented, it rearticulated and reinforced a somewhat well-defined test in deciphering what exactly constitutes a bill of attainder,¹¹⁵ which resulted in the present state of the issue today.

C. *Birth of the Public Fisc: Origins of the Appropriations Power*

The legislative power to appropriate was seen even before the medieval parliamentary acts of attainder, originating in the Magna Carta, which decreed that “[n]o scutage nor aid shall be imposed on [the English] kingdom, unless by common counsel of [the] kingdom.”¹¹⁶ This effectively transformed into Parliament’s limitations on the power of the King to raise revenue and injected Parliament into the fiscal decision-making process.¹¹⁷ Gradually, with the evolution of the English common law, Parliament was recognized to have “possessed an indisputable sovereignty” in the matters of lawmaking, taxation, and appropriation.¹¹⁸ Some English jurists went as

110. *See id.* at 847 n.3 (dismissing the notion that the denial of Title IV aid constituted punishment).

111. *See id.* at 851 (recognizing “that the severity of a sanction is not determinative of its character as punishment”).

112. *Id.* at 854 (citing 128 Cong. Rec. 9666 (1982) (remarks of Sen. Jepsen)) (noting Congress’ awareness that “more than half a million young men had failed to comply with the registration requirement” and proclaiming a response to such awareness was a legitimate legislative purpose).

113. *Id.* at 855–56 (examining the legislative history of the registration enforcement provisions and assessing it as “convincing support for the view that . . . Congress sought, not to punish anyone, but to promote compliance”).

114. *Id.* at 856.

115. *See infra* Part IV.A (describing the three-part test established post-*Selective Service* to determine whether legislation implicates punishment prohibited by the Bill of Attainder Clause).

116. Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1217 (2009) (quoting WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 232 (2d ed. 1914)) (internal quotations omitted).

117. *Id.* at 1217.

118. *Id.* at 1225 (quoting DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1845*, at 10–12 (9th ed. 1969)) (internal quotation marks omitted).

far as to believe that the right to appropriate was an absolute one, solely vested in “the faith of Parliament.”¹¹⁹

The notion of the legislature’s supreme rule over the appropriations process migrated across the Atlantic to the English New World. Colonial governments conducted their limited public financing schemes under the purview (and often abuse) of the colonial legislatures.¹²⁰ After the American Revolution and by the time of the Constitutional Convention, it became clear that “the right of appropriation could [not] be [properly] exercised by any branch other than the legislature.”¹²¹ This was by no means an accident; many of the Framers, including Madison, recognized that “the legislative department alone has access to the pockets of the people.”¹²² In the final iteration of the Constitution, legislative supremacy over the so-called “power of the purse” was enshrined in the Appropriations Clause.¹²³

Over the last two centuries, federal jurisprudence on the Appropriations Clause validated this idea. In the nineteenth century, the Court of Claims in *Hart’s Case*¹²⁴ explicitly held that “[t]he absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.”¹²⁵ The Supreme Court voiced its opinion later that century, noting that claims and debts for Congress to satisfy through appropriations “depend[ed] solely upon congress, and whether it will recognize claims thus founded *must be left to the discretion of that body*.”¹²⁶

Despite the Court’s holding in *Lovett*, there is an implied recognition of Congress’ supremacy and discretion to appropriate within the framework of the Bill of Attainder Clause. In *Flemming v. Nestor*,¹²⁷ the Social Security Administration terminated the benefits of the respondent, Ephram Nestor,

119. *Id.* at 1237 (quoting *Macbeath v. Haldimand*, (1786) 99 Eng. Rep. 1036, (K.B.) 1038; 1 T.R. 172, 176).

120. See DONALD R. STABILE, *THE ORIGINS OF AMERICAN PUBLIC FINANCE: DEBATES OVER MONEY, DEBT, AND TAXES IN THE CONSTITUTIONAL ERA, 1776–1836*, at 20–21 (1998) (describing the various colonial taxation protocols and the abuse of bills of credit by colonial legislatures). A look to taxation is critical because without taxation, there can be no appropriation. It is important to note that Britain retained the power to generally tax its colonies in the New World, and often did, to fund its massive spending and public debt. See *id.* at 21.

121. See Figley & Tidmarsh, *supra* note 116, at 1252 (articulating the viewpoint of the Framers).

122. THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961).

123. See Figley & Tidmarsh, *supra* note 116, at 1239. See generally U.S. CONST. art. I, § 9, cl. 7 (requiring that all disbursements from the treasury be prompted by an appropriation of law).

124. 16 Ct. Cl. 459 (1880), *aff’d*, 118 U.S. 62 (1886).

125. *Id.* at 484.

126. *United States v. Realty Co.*, 163 U.S. 427, 440–41 (1896) (emphasis added).

127. 363 U.S. 603 (1960).

on the grounds of his deportation, which in turn was based on his alleged membership in the Communist Party during the 1930s.¹²⁸ The Court rejected the district court's finding that the deprivation of social security benefits, which the Court described as "a form of social insurance, enacted pursuant to Congress' power to spend money in aid of the general welfare," constituted the deprivation of property akin to the punishment forbidden by the Bill of Attainder Clause.¹²⁹

The Court went further in dismissing the respondent's attainder-based arguments, noting that "the clearest proof" was required to make such an assertion of unconstitutionality; such was not present in Nestor's case.¹³⁰ Moreover, the sanction was "the mere denial of a noncontractual governmental benefit," hardly without a rational basis and far from reaching the scope of penalties traditionally considered punishment, such as imprisonment.¹³¹ Justice Harlan, speaking for the Court, stressed the importance of the long-standing deference to Congress in matters of appropriations, positing that "[w]hether wisdom or unwisdom resides in the scheme of benefits . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts."¹³² To do otherwise would require judicial assessment of Congressional motives, which the *Flemming* Court deemed "a hazardous matter."¹³³ The *Flemming* decision exhibited the Court's hesitance to intrude into an endeavor that was constitutionally prescribed to Congress alone.

The clearest affirmation of Congress' supremacy in the field of appropriations did not appear until the 1990s. In *Office of Personnel Management v. Richmond*,¹³⁴ the Court made it quite clear that "[m]oney may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute."¹³⁵ The majority placed heavy emphasis on deferring to Congress in the context of fiscal appropriations.¹³⁶ The "fundamental and comprehensive purpose" of such deference was to "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor

128. *Id.* at 604–05.

129. *Id.* at 608–09 (internal quotation marks omitted) (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

130. *Id.* at 617.

131. *Id.*

132. *Id.* at 611 (quoting *Helvering*, 301 U.S. at 644).

133. *Id.* at 617.

134. 496 U.S. 414 (1990).

135. *Id.* at 424.

136. *See, e.g., id.* at 427 (examining and accepting Justice Story's rationale that Congressional control of spending is necessary to prevent fraud and corruption).

of Government agents or the individual pleas of litigants.”¹³⁷ In sum, the Court determined it would be antithetical to the Constitution to allow anyone other than Congress to determine who should benefit from the public fisc. After *Richmond*, subsequent decisions by the circuit courts of appeal followed suit in ardently affirming Congressional supremacy over the appropriations power.¹³⁸

II. SETTING THE STAGE: THE ACORN CRISIS

On July 24, 2009, two aspiring conservative activists, James O’Keefe and Hannah Giles, walked into the Baltimore office of the Association of Community Organizations for Reform Now, a public interest group commonly referred to as ACORN.¹³⁹ Armed with a hidden video camera, O’Keefe and Giles were set on entrapping the ACORN office in an undercover sting operation, designed to elicit cooperation with apparent criminal activity.¹⁴⁰ O’Keefe presented himself to the ACORN staff as an aspiring lawyer and politician, and described Giles as being in a “unique business”—prostitution.¹⁴¹ In a conversation filled with subtle undertones, O’Keefe and Giles communicated to the Baltimore ACORN staff that they sought to purchase a home so that Giles could run her own prostitution ring.¹⁴² The duo furthered the appearance of criminality by proposing that child prostitutes from El Salvador would be utilized in this prostitution ring.¹⁴³ From the undercover footage, the Baltimore ACORN staff seemed not only to condone the pair’s feigned planning of criminal activities, but seemed willing to be complicit in them.¹⁴⁴

137. *Id.* at 427–28.

138. *See, e.g.*, *Am. Fed’n. Gov’t Emps. Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 408–09 (3d Cir. 2004) (affirming the purpose of the Appropriations Clause as the “place[ment] [of] authority to dispose of public funds firmly in the hands of Congress”); *City of Houston v. Dep’t of Hous. and Urban Dev.*, 24 F.3d 1421, 1424 (D.C. Cir. 1994) (“It is a well-settled matter . . . that . . . federal courts cannot order the expenditure of funds that were covered by [a fully obligated or lapsed] appropriation.”).

139. James O’Keefe, *Chaos for Glory: My Time with ACORN*, BIG GOVERNMENT (Sept. 10, 2009, 6:10AM), <http://biggovernment.com/jokeefe/2009/09/10/chaos-for-glory/#more-274>.

140. *Id.*

141. James O’Keefe, *Complete ACORN Baltimore Child Prostitution Investigation Transcript*, BIG GOVERNMENT, 1, 2–3 (Sept. 10, 2009, 6:49 AM), <http://biggovernment.com/jokeefe/2009/09/10/complete-acorn-baltimore-prostitution-investigation-transcript/>.

142. *See* O’Keefe, *supra* note 141, at 5–6 (showing a conversation between James O’Keefe, Hannah Giles, who is referred to as Kenya, and the ACORN staff, where “Kenya” informs ACORN that she has a job that has “male clients” that “could get [her] in trouble”).

143. *See id.* at 27 (recollecting the moment where the duo informs the ACORN staff that “there are like 13 girls from El Salvador” who “[would] be doing jobs”).

144. *See id.* at 16 (documenting the ACORN staff informing the duo on how to artfully comply with loan approval processes and tax filings).

The video was released on a conservative pundit's website and was followed up with similar office visits to Washington D.C., Brooklyn, New York, San Bernardino, and San Diego.¹⁴⁵ Once the videos were released, ACORN was subjected to public outrage and furor over its employees' willingness to facilitate the trafficking of underage girls for the sex trade.¹⁴⁶ President Obama, who held "infrequent ties" to the organization, jumped into the fray by noting that the conduct of ACORN employees as displayed on O'Keefe's videos "deserv[ed] to be investigated."¹⁴⁷

Congress decided to take it a step further. A myriad of bills were introduced by Republican leaders to completely strip ACORN of its funding.¹⁴⁸ However, instead of an independent bill, a funding ban against ACORN was incorporated into a continuing legislative appropriations resolution.¹⁴⁹ Congress voted 345 to 75 to defund the organization.¹⁵⁰

145. Videos of the trips were posted to the conservative website and blog, "BigGovernment.com." See generally James O'Keefe, *Washington, DC ACORN Video: Child Prostitution Investigation*, BIG GOVERNMENT (Sept. 11, 2009, 7:08 AM), <http://biggovernment.com/jokeefe/2009/09/11/washington-dc-acorn-video-child-prostitution-investigation/>; James O'Keefe, *ACORN Video: Prostitution Scandal in New York, NY*, BIG GOVERNMENT (Sept. 14, 2009, 12:35 AM), <http://biggovernment.com/jokeefe/2009/09/14/acorn-video-prostitution-scandal-in-new-york-ny/>; James O'Keefe, *ACORN Prostitution Scandal: California Here We Come!*, BIG GOVERNMENT (Sept. 15, 2009, 1:49 PM), <http://biggovernment.com/jokeefe/2009/09/15/acorn-prostitution-scandal-california-here-we-come/> (documenting the San Bernardino sting); James O'Keefe, *ACORN Video: Prostitution Scandal in San Diego, CA*, BIG GOVERNMENT (Sept. 17, 2009, 3:53 AM), <http://biggovernment.com/jokeefe/2009/09/17/acorn-video-prostitution-scandal-in-san-diego-ca/>. Since the videos were released, investigations have been launched into the veracity and authenticity of the tapes, giving rise to suggestions that the tapes were deliberately edited to fabricate ACORN's complicity in crime. See, e.g., CAL. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., REPORT OF THE ATTORNEY GENERAL ON THE ACTIVITIES OF ACORN IN CALIFORNIA 2-3 (Apr. 1, 2010), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1888_acorn_report.pdf (summarizing an investigation conducted by the California Attorney General on the allegedly illicit activities of ACORN as seen on the O'Keefe videotapes while describing the videos as heavily edited).

146. See Chris McGreal, *Congress Cuts Funding to Embattled Anti-Poverty Group ACORN*, GUARDIAN.CO.UK (Sept. 21, 2009, 16:38 BST), <http://www.guardian.co.uk/world/2009/sep/21/acorn-prostitution-videos> (describing the shock embraced by "many Americans" over the ACORN workers' willingness to discuss "the trafficking of girls for sex work").

147. Dan Eggen, *President: ACORN Videos 'Inappropriate'*, WASH. POST (Sept. 21, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/20/AR2009092002313.html>.

148. See, e.g., Defund ACORN Act, H.R. 3571, 111th Cong. (2009); Protect Taxpayers from ACORN Act, S. 1687, 111th Cong. (2009).

149. See Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009) (outlining "appropriation[s] for the Legislative Branch for the fiscal year ending September 30, 2010," including the prohibition of funds from being "made available . . . to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations").

150. Darryl Fears & Carol D. Leonnig, *The \$1,300 Mission to Fell ACORN*, WASH. POST. (Sept. 18, 2009), <http://www.washingtonpost.com/wp->

A. *Breaking New Ground: The District Court's Decision*

Not willing to let the legislation go unchallenged, ACORN filed suit to enjoin the federal government from complying with the legislation.¹⁵¹ ACORN relied on the Bill of Attainder Clause to challenge section 163 of the Continuing Resolution, which was interpreted by the Office of Management and Budget to mean that “[n]o agency or department should obligate or award any Federal funds to ACORN or any of its affiliates.”¹⁵² Such a singling out, ACORN argued, made the legislation a bill of attainder, with the prohibition serving as punishment for the political scandal surrounding the group.¹⁵³

The trial court agreed with this assessment. In enjoining the federal government from carrying out section 163, the trial court made five principal observations. First, *Lovett* was “particularly instructive” as a starting point because it dealt with an appropriations bill that had a punitive effect prohibited by the Bill of Attainder Clause.¹⁵⁴ Second, there was no valid, non-punitive purpose for Congress to enact legislation depriving ACORN of funding.¹⁵⁵ Third, less burdensome alternatives were available to ensure that any legitimate objectives, even if they existed, could be accomplished without a total appropriations ban.¹⁵⁶ Fourth, based on the legislative history, Congress determined ACORN’s guilt before defunding it.¹⁵⁷ Finally, even if Congress intended to deter *future* criminal conduct by using the public fisc, its act still constituted punishment; the goal of deterring future acts, the court reasoned, was still a traditional rationale for judicial punishment.¹⁵⁸ With this assessment in tow, the district court

dyn/content/article/2009/09/17/AR2009091704805.html?hpid=topnews&sid=ST2009091704852.

151. See generally *ACORN I*, 662 F. Supp. 2d 285, 287 (E.D.N.Y. 2009) (explaining that ACORN filed a suit against the United States challenging the Continuing Appropriations Resolution as an unconstitutional bill of attainder) *aff’d in part, vacated in part*, 618 F.3d 125 (2d Cir. 2010).

152. *Id.* at 289 (quoting an “OMB Memorandum” issued by Director Peter Orzag (citations omitted)).

153. *Id.*

154. *Id.* at 292.

155. See *id.* at 293 (explaining that the Government’s reference to *Flemming* and *Selective Service* to show the nonpunitive nature of its actions against ACORN was inapposite because *Flemming* lacked a legislative record of purely punitive intent, and *Selective Service* “had the valid goal of encouraging a class of persons to . . . register for the draft”).

156. See *id.* at 295 (citing Congress’ failure to rely on “available mechanisms for investigation” through various federal agencies).

157. See *id.* at 294 (“[T]he nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN’s guilt before defunding it.”)

158. See *id.* (rejecting the government’s argument that the deterrence of future misconduct was not a punitive aim under the Bill of Attainder Clause, and emphasizing that the deterrence of future conduct “is a traditional justification of punishment”).

enjoined the United States from enforcing the congressionally-mandated funding ban.¹⁵⁹

*B. An Appealing Appeal: The Second Circuit's Restoration of the
ACORN Funding Ban*

In the aftermath of the district court's ruling, the United States filed an appeal with the Second Circuit,¹⁶⁰ and the lower court's decision was stayed.¹⁶¹ In an opinion released less than a year after the trial court's injunction was issued, the Second Circuit, with Judge Miner writing for a unanimous panel, vacated the trial court's invocation of the Bill of Attainder Clause.¹⁶² In examining whether the withdrawal of appropriations was within the scope of coverage of the Clause, the court, using the post-*Nixon/Selective Service* test for punishment, evaluated the historical punishment, functional punishment, and legislative history/motivational prongs of the current attainder test.¹⁶³

The court easily observed that the withdrawal of appropriations could not constitute punishment as defined historically, failing the first part of the three-pronged punishment test.¹⁶⁴ Lacking "imprisonment, banishment, [and] death," the continuing resolution could not be a bill of attainder as classically defined.¹⁶⁵ The court went further to dispel any correlation between historical bills of attainder and the "taint" and stigma suffered by ACORN; such an effect of alienation was inconsequential in light of Congress' "authority to suspend federal funds to an organization that has admitted to significant mismanagement."¹⁶⁶

159. *See id.* at 299–300 (issuing a preliminary injunction enjoining Executive Branch officials).

160. Brief for Appellants, *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010) (Nos. 09-5172-cv, 10-992-cv), 2010 WL 3214690.

161. Emergency Stay, *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010) (Nos. 09-5172-cv, 10-992-cv), available at <http://republicans.oversight.house.gov/images/stories/SecondCircuitOrderGrantingStay.pdf>.

162. *ACORN v. United States (ACORN II)*, 618 F.3d 125, 142 (2d Cir. 2010).

163. *Id.* at 136.

164. *See ACORN II*, 618 F.3d at 137 (holding that the withdrawal of appropriations "does not constitute a traditional form of punishment").

165. *Id.*

166. *See id.* (acknowledging that the appropriations ban may have caused some stigma but rejecting the notion that Congress' exercise of its spending power was "so disproportionately severe and so inappropriate to nonpunitive ends as to invalidate the resulting legislation as a bill of attainder" (internal quotation marks omitted) (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473 (1977))). Interestingly enough, while most of the Second Circuit's opinion concentrates on Congress' appropriations power, the court bases some of its discussion on the related Spending Clause. Nevertheless, for purposes of expressing the supremacy of Congress' appropriations power, any difference between the Spending Clause and the Appropriations Clause is inapposite. *Compare Sabri*, 541 U.S. at 605 (establishing that "Congress has authority under the Spending Clause . . . to promote the general welfare, . . . and it has corresponding authority under the Necessary and Proper Clause . . . to see to it that taxpayer

Next, the court turned to ACORN's arguments on functional punishment. There were three central arguments which ACORN made and the court refuted in this regard: first, Congress' specific naming of ACORN as a party to be excluded from federal funding was in itself functional punishment;¹⁶⁷ second, to target the unnamed affiliates of ACORN would be functionally punishing those allied organizations;¹⁶⁸ and third, the bypassing of administrative procedures in imposing the funding ban indicated functional punishment.¹⁶⁹

In fairly efficient form, the court dismantled each argument in turn. The court first rejected the idea that specificity alone could make the withholding of appropriations an action of attainder.¹⁷⁰ Congress, the court reasoned, "may single out an entity or person in its legislation."¹⁷¹ In addition, the court observed, the targeting of unnamed allies and affiliates of ACORN had the effect of hurting ACORN's case; leaving such groups unnamed left room for federal agencies to determine who fell under the appropriative ban, similar to a rule of general applicability permitted under the Bill of Attainder Clause.¹⁷² Finally, the Second Circuit rejected the notion that the circumvention of administrative procedures made the appropriations ban punitive; the court, in light of the special nature of congressional appropriations, declined to view such circumvention as indicative of prohibited punishment.¹⁷³

Observing that the congressional ban was neither historical nor functional punishment, the court turned to the final prong of legislative history and punitive motivation to determine whether the legislation could be deemed a bill of attainder.¹⁷⁴ The panel acknowledged that several statements made by Members of Congress accusing ACORN of criminal conduct could be potentially reflective of a legislative intent to punish, but

dollars . . . are . . . not frittered away in graft"), with *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990) (explaining that Congress' appropriations power "constitutes a most useful and salutary check upon . . . corrupt influence and public speculation" (internal quotation marks omitted) (quoting *STORY*, *supra* note 28, § 1348)).

167. *ACORN II*, 618 F.3d at 139.

168. *Id.*

169. *Id.* at 139–40. This argument is founded upon a jurisdiction-specific observation made by the Second Circuit in *Consolidated Edison Co. v. Pataki*, 292 F.3d 338 (2d Cir. 2002), where the court found that a law that bypassed administrative procedures to impose a burden upon an entity would suggest that such legislation was imposing functional punishment. *Id.* at 349. ACORN also made a fourth argument with respect to functional punishment, premised on the notion that a favorable GAO investigation would not resolve the funding ban. *ACORN II*, 618 F.3d at 139–40. This argument was summarily dismissed by the court. *Id.*

170. *ACORN II*, 618 F.3d at 139.

171. *Id.* at 138 (citing *Nixon*, 433 U.S. at 469–72).

172. *Id.* at 139.

173. *Id.* at 140.

174. *Id.* at 141.

declared that without a congressional *finding* of guilt,¹⁷⁵ usually of the type that follows a legislative trial,¹⁷⁶ the ban against ACORN and its affiliates could not be perceived as motivated by an unlawful punitive intent.¹⁷⁷

Meeting none of the criteria required by what the Second Circuit interpreted to be the post-*Nixon* bill of attainder test, the trial court's injunction was vacated, and ACORN's funding ban was restored.¹⁷⁸

III. ANALYSIS

ACORN presents the deceptively basic, yet truly complex, issue of whether congressional defunding of a private organization constitutes a bill of attainder—the answer to which has been described as “generally elusive and perhaps even illusory.”¹⁷⁹ Before analyzing whether the Bill of Attainder Clause can be used to restrain the appropriations power of Congress, we must first decipher the current landscape of the attainder doctrine. There are two separate components that are essential in understanding the Bill of Attainder Clause's interplay with the Appropriations Clause; the Bill of Attainder Clause must be understood in its application, and it must also be understood as a concept.

In terms of its application, as described in Part I, the Court has relied on two radically different interpretations of the Bill of Attainder Clause: the narrow, literalist, Frankfurterian approach, which focuses on the original intent with respect to the prohibition against bills of attainder;¹⁸⁰ and the broad, functionalist, anti-Frankfurterian approach, where the notion of

175. *Id.* at 142.

176. *But see id.* (explaining that legislative trials do not consist of the only mechanism to establish the high level of proof needed for unconstitutional punitive intent to be reflected in the legislative record).

177. *See id.* (dismissing the statements made by legislators accusing ACORN of criminal activity as insufficient to meet the threshold required by the Bill of Attainder Clause); *see also id.* at 141 (declaring that a “smattering” of statements by legislators “do not constitute [the required] unmistakable evidence of punitive intent” (alteration in original) (quoting *Selective Serv. Sys. v. Minn. Pub. Research Grp.*, 468 U.S. 841, 846 n.15 (1984)) (internal quotation marks omitted)). To buttress the notion that ACORN's mismanagement was at the center of the appropriations ban, the court relied on an independent report commissioned by ACORN named the “Harshbarger Report,” which covered ACORN's mismanagement leading up to and including the prostitution scandal. *See id.* at 130–31.

178. *Id.* at 142.

179. Eugene Volokh, *District Court Preliminarily Enjoins ACORN Defunding Law as a Bill of Attainder*, THE VOLOKH CONSPIRACY (Dec. 11, 2009, 9:38 PM), <http://volokh.com/2009/12/11/district-court-preliminarily-enjoins-acorn-defunding-law-as-a-bill-of-attainder/>.

180. *See generally* *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (rejecting a Communist registration requirement as a bill of attainder for lack of specificity); *United States v. Lovett*, 328 U.S. 303, 329–30 (1946) (Frankfurter, J., concurring) (advocating for a strict interpretation of the Bill of Attainder Clause as defined by history).

punishment is open to wider interpretation.¹⁸¹ In addition, the Clause itself has been justified by two different *conceptual* perspectives: as an enshrinement of the separation of powers,¹⁸² and as an early guarantee of due process.¹⁸³

When a matter of legislative appropriations is viewed in light of the Bill of Attainder Clause, much is revealed about both its conceptual limitations and the proper mode of interpretation. First, the scenarios presented by *ACORN* and other similar situations demonstrate that the functionalist approach is unworkable, at least when viewing something as constitutionally sacrosanct as the Appropriations Clause.¹⁸⁴ Second, the interplay between attainder and appropriations suggests that certain conceptual views of the Bill of Attainder Clause, such as the notion that it reinforces the separation of powers or that it is a guarantee of due process, fail to advocate for the functionalist approach.¹⁸⁵ Finally, the analysis shows that only the originalist, Frankfurterian interpretation can conform to the expectations of the Constitution.¹⁸⁶

A. Of Funding and Punishment: The Failure of the Broad, Functionalist Interpretation of the Bill of Attainder Clause

Despite the muddled history and interpretation of the Bill of Attainder Clause, its gradual constitutional evolution has led to a test that evaluates three primary factors to determine whether a legislative act truly constitutes the prohibited punishment (aside from an obvious specificity requirement).¹⁸⁷ First, the bill may constitute “historical attainder”: the imprisonment, banishment, and punitive confiscation of property

181. See generally *Brown v. United States*, 381 U.S. 437, 458 (1965) (permitting the notion of punishment to include the prohibition of Communist Party members from being union leaders); *Lovett*, 328 U.S. at 316 (widening the scope of the attainder laws to encompass punishment via denial of appropriative funding); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324–25 (1866) (broadening the notion of punishment to include the deprivation of employment from a priest); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (extending the punitive aspect of the Bill of Attainder Clause to include prohibiting former Confederate officers from serving as attorneys).

182. See, e.g., STORY, *supra* note 28, § 1344 (describing the Bill of Attainder Clause as a means of prohibiting legislative assumption of the “judicial magistracy”).

183. See generally *Welsh*, *supra* note 16, at 110–11 (advocating for the Bill of Attainder Clause to function as a due process guarantee where a typical Fifth Amendment or Fourteenth Amendment due process or equal protection claim would fail).

184. See discussion *infra* Part III.A (analyzing an appropriations ban through the current attainder test and observing its ambiguity and inefficacy).

185. See discussion *infra* Part III.B, III.C (arguing that the separation of powers rationale supports an abandonment of the current bill of attainder test and noting that the traditional due process concerns do not apply to matters of legislative appropriations, respectively).

186. See discussion *infra* Part III.D (advocating for the adoption of a narrowed, literalist interpretation of the Bill of Attainder Clause to avoid constitutional conflicts).

187. See *supra* notes 97–102 and accompanying text.

historically accorded to attainted individuals.¹⁸⁸ Second, the bill may also contain “functional” punishment; that is, if it serves to burden or deprive an individual in a manner inconsistent with the Bill of Attainder guarantee, then it may be deemed unconstitutional.¹⁸⁹ Part of determining whether a bill constitutes “functional” punishment is determining whether it reasonably serves to further nonpunitive goals.¹⁹⁰ If it does not, then it is easier to make a finding of functional punishment.¹⁹¹ Finally, the legislative history of an act may also support a finding of attainder; if a clear and unambiguous showing of punitive intent is shown on the part of the legislature, then a law may properly be deemed a bill of attainder.¹⁹²

On its surface and as a general rule of legal application, the law on bills of attainder seems relatively straightforward. If there is either historically recognized or modern, functional punishment, combined with a clear and unambiguous showing of punitive intent, then the law is constitutionally prohibited.¹⁹³ But in fact, this approach is an awkward amalgam encompassing both the literal, Frankfurterian school of thought and the expansive, anti-Frankfurterian doctrine. It incorporates Frankfurter’s belief that the Bill of Attainder Clause is a “very special” type of provision, designed to be constrained by history, but also gives rise to a more flexible, functional approach to defining “punishment,” as seen in *Brown*.¹⁹⁴

The constitutional conflict inherent in attempting to control the appropriations power using the Bill of Attainder Clause is shown in a

188. See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 474 (1977) (describing the means of punishment as understood historically).

189. See, e.g., *Selective Serv. Sys. v. Minn. Pub. Research Grp.*, 468 U.S. 841, 851 (1984) (noting that the inquiry as to punishment does not stop at a historical analysis of punishment; a functional analysis must also be included).

190. See *id.* at 853–54 (explaining the role of legislative purpose as part of the calculus of punishment).

191. See *id.* (describing the nonpunitive goals of the selective service requirement as expressed through legislative history in holding that it did not constitute functional punishment).

192. See, e.g., *Nixon*, 433 U.S. at 478 (highlighting that the third test of punishment is “a motivational one: inquiring whether the legislative record evinces a congressional intent to punish”); see also *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (establishing that the “clearest proof” is required to strike down a law as a Bill of Attainder).

193. See *Nixon*, 433 U.S. at 473–78 (listing the three prongs of the attainder/punishment analysis and describing the role of the third prong of motivational punishment).

194. See *United States v. Lovett*, 328 U.S. 303, 321–22 (1946) (Frankfurter, J., concurring) (describing the Bill of Attainder Clause as “very special,” and limited to a specific set of narrow circumstances as intended, where the legislature usurps the traditional judicial function). A strong argument can be made that *Lovett*, *Garland*, and *Cummings* constituted punishment in the traditional sense, as there are arguments to be made with respect to deprivation of property. Although the means by which such deprivations took place were uncommon and not necessarily thought of as judicial—such as the appropriations act in *Lovett* or the loyalty oaths in *Garland* and *Cummings*—the net effect was an occupational deprivation, something that can constitute a deprivation of livelihood and property.

straightforward, post-*Nixon* and *Selective Service* analysis. As understood historically, it seems clear that when Congress bars an organization from being funded, it constitutes neither attainder nor a bill of pains and penalties; the only conceivable argument that could be made is that the withdrawal of appropriations constitutes a punitive confiscation of property.¹⁹⁵ The denial of appropriations, however, does not constitute the taking of property because Congress is not imposing a fine or other monetary penalty; rather, Congress is prohibiting further access to the public coffers, denying a benefit it had previously bestowed.¹⁹⁶ As the Parliamentary history of both bills of attainder and bills of appropriation demonstrates, the two have wholly separate origins, and the denial of a right to funding can hardly be considered “historical” punishment.¹⁹⁷

But under the more nebulous, “functional punishment” assessment, one is more quickly inclined to believe that the deprivation of appropriation could constitute a bill of attainder. After all, in accordance with Justice Field’s idea that the Constitution deals with “substance, not shadows,” any form of legislative contrivance could conceivably be a bill of attainder, so long as there is a specific target and the net effect of the legislation imposes a burden on an individual.¹⁹⁸ In fact, the legislative device at issue in *Lovett* was an appropriations bill that resulted in unlawful punishment through the prohibition of funding, as seen in *ACORN*.¹⁹⁹ Presumably,

195. See, e.g., *Nixon*, 433 U.S. at 474 (defining the traditional historical array of punishment as including execution, imprisonment, banishment, and the punitive confiscation of property (internal citations omitted)).

196. Compare Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009) (prohibiting any federal funding from being directed to ACORN and its affiliates), with Memorandum from the Cong. Research Serv. to the House Judiciary Comm. (Dec. 22, 2009), available at <http://www.lexisnexis.com/congcomp/getdoc?CRDC-ID=CRS-2009-CRS-0002> (showing a congressionally-directed allocation of \$140,000 to the New York ACORN program for Juvenile Justice Programs through the Department of Justice).

197. See *Bills of Attainder*, *supra* note 23, at 79–81 (describing the typical reasons for a Parliamentary bill of attainder or a bill of pains and penalties, as well as the procedure in which such bills are passed); Figley & Tidmarsh, *supra* note 116, at 1217–25 (explaining the British origins of the appropriations power, from the Magna Carta to post-Revolutionary England); see also LEVY, *supra* note 15, at 71 (establishing the history of the *American* colonial use of bills of attainder, prior to the constitutionally-imposed ban).

198. See, e.g., *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866) (condemning the postbellum loyalty oaths for their specificity in presuming the guilt of priests and clergymen and resulting deprivation of rights by “legislative enactment”).

199. Compare Urgent Deficiency Appropriation Act of 1943, Pub. L. No. 78-132, § 304, 57 Stat. 431, 450 (“No part of any appropriation, allocation, or fund . . . shall be used . . . to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett . . .”), with Continuing Appropriations Resolution, 2010 § 163 (“None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now . . . or any of its affiliates, subsidiaries, or allied organizations.”).

under this approach, any legislative deprivation could be sufficient to constitute a bill of attainder so long as the specificity element is met.²⁰⁰

Compounding the problem is that every act of congressional appropriations comes with the inherent assumption that the legislature is acting on behalf of the general welfare of the country.²⁰¹ This goes to the nonpunitive intent aspect of the functional punishment analysis; if appropriations bills are drafted in a manner that is based on constitutionally-vested congressional judgments, then, according to the functional punishment rationale, legislation concerning appropriations could almost never constitute a bill of attainder as there will always be a nonpunitive rationale present.²⁰² The presumption can only be rebutted in cases where the punitive intent for appropriations is overwhelming.²⁰³ This underlying presumption of acting in the general welfare is especially salient

200. See Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 334 (1962) [hereinafter Ely] (noting that some cases have established that *any* deprivation can amount to punishment). While the aforementioned student comment is unsigned, the amici brief of a group of constitutional law professors to the ACORN appeal notes that Professor Alan Dershowitz of Harvard Law School confirmed Professor John Hart Ely's role in authoring the work as a student at Yale Law School. See Brief of Constitutional Law Professors as Amici Curiae Supporting Plaintiffs-Appellees at 8 & n.3, ACORN v. United States, 618 F.3d 125 (2d Cir. 2010) (Nos. 09-5172-cv (L), 10-992-cv (CON)) [hereinafter Brief for Amici Curiae] (citing Alan M. Dershowitz, *Visibility, Accountability and Discourse as Essential to Democracy: The Underlying Theme of Alan Dershowitz's Writing and Teaching*, 71 ALB. L. REV. 731, 737 & n.14 (2008)). Because of Professor Dershowitz's revelation, all subsequent references to Ely's student unsigned comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause* will be attributed to Ely and referred to as such. The Ely Comment is significant in that it lays the modern foundation for functionalist arguments that the Bill of Attainder Clause is to be broadly construed, with some arguing that the *Brown* Court relied on the Ely Comment to attack the strict, narrow interpretation of the Frankfurterian approach. E.g., Berger, *supra* note 13, at 379–80 (arguing that the *Brown* Court's decision "closely paraphrased [Ely's] position").

In light of Ely's expansive view of punishment, courts have warned that such a view has the potential to unjustifiably constrict the powers of the legislature. E.g., *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987) (warning that "all modern legislation regulating the economic activities of specific groups might be considered 'punishments,'" and additionally observing that "the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislatures to respond to some perceived social or economic problem").

201. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990) (describing the "fundamental and comprehensive purpose" of the Appropriations Clause to ensure that "public funds will be spent according to the . . . judgments reached by Congress as to the common good" (emphasis added)).

202. Cf. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 515 (1937) (assuming that the determination as to "whether [a] present expenditure serves a public purpose" has been made by the "law-making department," and as a result, the court will refuse to intervene unless there is "a plain case of departure from every public purpose which could reasonably be conceived").

203. See, e.g., *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 83 (1961) (asserting that the "clearest proof" is necessary to strike down a law as a bill of attainder, and in light of this, finding that the Communist registration requirements were not "so lacking in consonance as to suggest a clandestine purpose" of punishment).

for corporations and organizations such as ACORN, who receive appropriations with the expectation that Congress has “the power to control and direct the appropriations . . . [as] a most useful salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation.”²⁰⁴ If an attainder analysis demands that the “clearest proof” of punitive intent be offered,²⁰⁵ then the underlying supposition that all appropriations acts are done for the sake of the public welfare, in both commission and prohibition, bars such clarity from being delivered.

The final complexity arises from the third factor of the current attainder analysis: a clear “congressional intent to punish.”²⁰⁶ Pegging the attainder analysis on the legislative history of a particular provision treads on dangerous terrain, especially for an appropriations bill. “[T]o look for congressional intent is to engage in anthropomorphism—to search for something that cannot be found because it does not exist.”²⁰⁷ Moreover, legislative history can contradict itself; by premising attainder analysis on it, judges can “pick and choose those bits which support the result [they] want to reach.”²⁰⁸

Take, for example, the *ACORN* case. At the very least, the contrast between the district court’s decision and the reversal by the Second Circuit highlights the vast inconsistency in interpreting the legislative record.²⁰⁹ The trial court cites several legislative accusations of criminality, most notably Congressman Darrell Issa’s publication of a report entitled, “Is ACORN Intentionally Structured as a Criminal Enterprise?”²¹⁰ In discussing ACORN, legislators ran the gamut on reasons to punish the organization,²¹¹ calling ACORN a facilitator of child prostitution,²¹² a racketeering organization,²¹³ and a “reprehensible enterprise” engaged in

204. See *Richmond*, 496 U.S. at 427 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858)) (internal quotation marks omitted)).

205. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

206. See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 478–79 (1977).

207. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998).

208. *Id.*

209. Compare *ACORN I*, 662 F. Supp. 2d 285, 296–97 (E.D.N.Y. 2009) (finding that the statements made by various Members of Congress “underline[d] the punitive nature of the government’s purportedly non-punitive reason”), *aff’d in part, vacated in part*, 618 F.3d 125 (2d Cir. 2010), with *ACORN II*, 618 F.3d 125, 142 (2d Cir. 2010) (declining to find a punitive legislative intent despite the presence of the statements observed by the trial court because “there is no congressional finding of guilt”).

210. *ACORN I*, 662 F. Supp. 2d at 296–97.

211. See Brief of Appellant at 34, *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010) (Nos. 09-5172-cv (L), 10-992-cv (CON)) (summarizing floor statements made regarding the ACORN scandal).

212. 155 CONG. REC. H9952 (daily ed. Sep. 24, 2009) (statement of Rep. Bachman).

213. 155 CONG. REC. H9788 (daily ed. Sep. 22, 2009) (statement of Rep. Carter).

illegal activity.²¹⁴ But proponents of the funding prohibition also supported the bill out of a concern to “defend taxpayers against waste, fraud, and abuse.”²¹⁵ Deciphering the intent of any legislation, much less an appropriations bill, can be a haphazard guess, making it practically impossible to determine whether a sufficiently clear indication of punitive intent exists.²¹⁶ The Second Circuit correctly observed as much and, failing to see the clarity demanded by the attainder analysis to defeat the presumption of constitutionality,²¹⁷ declined to find the legislative record sufficient to support a punitive intent.²¹⁸

In sum, applying the current bill of attainder test to a legislative act prohibiting appropriative funding for one specific group demonstrates the following. First, the withdrawal of appropriations can never be deemed a “historical” punishment.²¹⁹ Second, the broad understanding of what can constitute “functional punishment” includes the prospect of an appropriations ban being punitive, but this notion is undercut by the fact that legislatures have a legitimate rationale for spending (or withholding) for the sake of the general welfare, thus having nonpunitive intent implied with every appropriation made or taken away.²²⁰ Third, the legislative history reveals at least some degree of conflict in terms of legislators’ intent with respect to the prohibitive provision.²²¹ In other words, the modern test leaves us in paradoxical terrain.²²² While the *ACORN* trial court found that Congress legislated a bill of attainder through section

214. 155 CONG. REC. H9555 (daily ed. Sep. 16, 2009) (statement of Rep. Bilirakis).

215. 155 CONG. REC. S9517 (daily ed. Sept. 17, 2009) (statement of Senator Johanns). Indeed, the trial court cited this in its opinion, but misinterpreted it as a prohibited expression of a punitive legislative intent. *See ACORN I*, 662 F. Supp. 2d at 296. As discussed below, in most instances, Congress may pass judgment on the misuse of federal funds and withdraw funding accordingly, without being questioned by judicial oversight.

216. *See Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (expressing that judicial attempts to inquire into Congressional motives, beyond objective manifestations, make for “a dubious affair indeed”).

217. *See, e.g., id.*

218. *See ACORN II*, 618 F.3d 125, 142 (2d Cir. 2010) (comparing the legislative record of *ACORN* to the secret trial held in *Lovett* and declaring that the “smattering” of legislative statements rhetorically indicting *ACORN* of criminal activity was insufficient to establish “unmistakable evidence” of punitive intent).

219. *See supra* notes 195–97 and accompanying text.

220. *See supra* notes 198–205 and accompanying text (questioning whether the deprivation of appropriations can constitute “functional punishment” in light of an inherent, legitimate, nonpunitive purpose); *see also* Berger, *supra* note 13, at 358 (decrying the comparison between legislation passed with “Congress’ salutary purpose” in mind and bills of attainder as “sanguinary hyperbole”).

221. *See supra* notes 206–15 and accompanying text.

222. *See* Berger, *supra* note 13, at 358 (explaining that the expansive attainder test has “engendered confusion, particularly in the attempt to define what constitutes ‘punishment’ for purposes of a bill of attainder” (internal citations omitted)).

163,²²³ it just as easily could have interpreted the legislation another way, as the Second Circuit did in the *ACORN* appeal.²²⁴ As the separation of powers and due process rationales discussed below support, the current test, while comprehensive, is a poor amalgam for determining what truly constitutes a bill of attainder; a return to the narrow, originalist, Frankfurterian approach is necessary to reestablish constitutional tranquility.²²⁵

1. *Counterpoint: weighing the arguments for the preservation of the functionalist approach*

Several constitutional law scholars²²⁶ have strongly advocated for the preservation of the functional, rather than the adoption of the formalistic, approach to the Bill of Attainder Clause.²²⁷ Relying on the functionalist language provided in *Cummings*,²²⁸ *Lovett*,²²⁹ and *Brown*,²³⁰ the scholars conclude that an expansive analysis is necessary to “look behind the literal terms of a statute in assessing the permissibility of the legislative regulation.”²³¹

The scholars’ major contention is premised on *Brown* and *Lovett*, in that the Bill of Attainder Clause bars the imposition of almost anything that

223. *ACORN I*, 662 F. Supp. 2d 285, 297 (E.D.N.Y. 2009), *aff’d in part, vacated in part*, 618 F.3d 125 (2d Cir. 2010).

224. *See generally ACORN II*, 618 F.3d 125 (2d Cir. 2010) (declaring that Congress’ appropriations ban against ACORN could not constitute a bill of attainder because it failed to meet the three-pronged test for legislation).

225. *See generally United States v. Lovett*, 328 U.S. 303, 319 (1946) (Frankfurter, J., concurring) (characterizing his interpretation as a means of “prevent[ing] collision between Congress and Court”).

226. These scholars include Dean Erwin Chemerinsky, along with Professors Bruce Ackerman, David D. Cole, Michael C. Dorf, Mark Graber, Seth F. Kreimer, Sanford V. Levinson, Burt Neuborne, and Stephen Vladeck. Brief for Amici Curiae, *supra* note 200, at 1a–2a.

227. *See id.* at 1 (observing that the “federal Bill of Attainder Clause ‘was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against the legislative exercise of the judicial function’” (quoting *United States v. Brown*, 381 U.S. 437, 2 (1965))).

228. *Id.* at 9 (“The Constitution deals with substance, not shadows” (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866))).

229. *Id.* (“[L]egislative acts, *no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.” (alteration in brief) (emphasis added in brief) (quoting *United States v. Lovett*, 328 U.S. 303, 315–16 (1946))).

230. *Id.* at 10 (“[T]he Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.” (quoting *Brown*, 381 U.S. at 447)). *But see Berger*, *supra* note 13, at 369 & n.99 (accusing Chief Justices Warren and Burger of inflating the dicta of Chief Justice Marshall’s statement in *Fletcher*).

231. Brief for Amici Curiae, *supra* note 200, at 10.

could remotely be perceived as punishment.²³² It is entirely possible, however, that the scholars have read too much into the language of the functionalist cases.²³³ In referring to the many forms of punishment that can be presented, the Court has warned of the many creative legislative paths that could potentially impose a traditionally judicial punishment on an individual; this is, in fact, what the Bill of Attainder Clause guards against.²³⁴ An expansive approach to the attainder prohibition sought to prevent Congress from imposing fines, prison sentences, and other traditionally judicial deprivations through crafty legislative methods that imposed inconvenient, difficult, or impossible requirements on specific individuals.²³⁵ The language of the functionalist cases could potentially be aimed towards the problem of creative legislative drafting, and not necessarily the burden or the perceived punishment of a particular bill.²³⁶ As discussed below, the separation of powers arguments accentuate the notion that the attainder analysis should be limited to instances where Congress metes out traditionally judicial punishments to single individuals, and the definition of “punishment” should be constrained.²³⁷

Assuming *arguendo* that the functionalist scholars (who served as amici to the *ACORN* appeal) are correct in advocating for the functionalist approach, there are still a number of unresolved issues. For one, there is no demonstration as to how the deprivation of appropriations constitutes “punishment.” While scholars suggest that the “denial of eligibility for a particular government benefit can constitute punishment within the

232. *Id.* at 13 (explaining that “*Lovett* . . . stands for the proposition . . . that ‘punishment’ in the context of bill of attainder analysis . . . [requires] simply the legislature’s imposition of any kind of punishment (for past conduct or behavior) on specified persons”).

233. In fact, it may be entirely possible that the attainder analysis presented by the scholars is incomplete, failing to take into consideration (or deliberately omitting) the other half of the attainder jurisprudence. It is interesting to note that the scholars, serving as amici curiae in the *ACORN* appeal, do not cite a single literalist case in support of their argument.

234. *Cf.* *United States v. Lovett*, 328 U.S. 303, 323–24 (1946) (Frankfurter, J., concurring) (concluding that the Framers intended for the prohibition against bills of attainder to require the imposition of punishments typically found in historical bills of attainder, e.g. death, or bills of pains and penalties).

235. For example, section 504 of the Labor-Management Reporting and Disclosure Act, at the center of *Brown*, barred Communists from serving in union leadership positions; violation was met by a rather traditional punishment of a short prison sentence and/or a fine of \$10,000. *See United States v. Brown*, 381 U.S. 437, 438–39 (1965) (citing Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 504, 73 Stat. 519, 536).

236. *See, e.g., Brown*, 381 U.S. at 447 (“[T]he Bill of Attainder Clause was not meant to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity . . .” (emphasis added)). *But see Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866) (rejecting a narrowed interpretation limiting punishment to the deprivation of life, liberty, and property).

237. *See* discussion *infra* Part III.B.

meaning of the Bill of Attainder Clause,”²³⁸ and cite the denial of employment benefits in *Lovett* to buttress their theory,²³⁹ *Flemming* seems more relevant and analogous, undercutting the functionalist rationale.²⁴⁰ Although scholars emphasize the role that Congress played in depriving benefits over the actual nature of the benefits deprived in *Lovett*, it is critical to note that the *Flemming* Court condoned the deprivation of noncontractual governmental benefits as an appropriative matter beyond the ambit of traditional judicial punishment.²⁴¹ Thus, the scholars’ claim that *Lovett* and its progeny simply require “the legislature’s imposition of any kind of punishment (for past conduct and behavior)”²⁴² is tenuous, only ambiguously supported by the case law, and ignores the other Frankfurterian half of attainder jurisprudence.²⁴³

B. *Attainder Versus Appropriations: A Murky Separation of Powers*

One of the primary conceptual rationales behind the Bill of Attainder Clause is that it serves as a guardian of the separation of powers, premised on the notion “that no single body can alone effectuate the total policy of government.”²⁴⁴ The Framers were concerned about the legislative power becoming too great and being tyrannically exercised over individuals in scenarios where the judiciary should be playing the primary role.²⁴⁵ To commentators such as the late Professor John Hart Ely, the Bill of Attainder Clause serves as the inverse, legislative analogue to the Article III cases and controversies requirement—a constitutional barrier preventing Congress from crossing over into the terrain of the judiciary.²⁴⁶

238. Brief for Amici Curiae, *supra* note 200, at 12.

239. *See id.* (noting that the *Lovett* Court held the legislative barring of “government funds to pay three specified government employees determined by the House to have engaged ‘subversive activity’” constituted a prohibited bill of attainder (citing *United States v. Lovett*, 328 U.S. 303, 313–17 (1946))).

240. *Flemming* dealt with the Social Security system and deemed the program an enactment “pursuant to Congress’ power to spend money in aid of the general welfare.” *Flemming v. Nestor*, 363 U.S. 603, 609 (1960) (citations omitted). Arguably, directed congressional appropriations are a benefit similar to social security, enacted for the general welfare.

241. *See id.* at 617 (dismissing the sanction of social security benefits as “the mere denial of a noncontractual governmental benefit”).

242. Brief for Amici Curiae, *supra* note 200, at 13.

243. *See Fleming*, 363 U.S. at 617 (assessing the denial of governmental benefits as a “mere denial” not within the scope of the Bill of Attainder Clause); *see also Lovett*, 328 U.S. at 330 (Frankfurter, J., concurring) (arguing that the blocking of federal funds for the employment of the plaintiffs was not punishment per se, but a contractual issue of pay).

244. Ely, *supra* note 200, at 343.

245. *See id.* at 344 (establishing the Framers’ concerns over the “dangers of the combined exercise of the legislative and adjudicatory functions”).

246. *See id.* at 347 (explaining in detail how Article III prohibits encroachment on the rulemaking abilities of Article I, and how the Bill of Attainder Clause prevents encroachment into the specific application of law as typically prescribed by the judiciary).

But the separation of powers argument falters when the Bill of Attainder Clause is injected into the appropriations process. Appropriations, by their very nature, are legislated with specificity.²⁴⁷ Congress' power to appropriate is absolute;²⁴⁸ the executive answers to the conditions of the legislature and the judiciary is in no position to play the legislature's role, making the power to appropriate an anomalous one in the context of separation of powers concerns.²⁴⁹

Moreover, as Ely notes, the Bill of Attainder Clause was meant to prohibit trials by legislature; the worries over legislative *punishment* are ancillary to the primary concerns of legislative *usurpation*.²⁵⁰ But as *Richmond* and other cases dealing with the Appropriations Clause suggest, Congress frequently undertakes legislative judgments with respect to the

247. See, e.g., *Earmarks*, OFFICE OF MANAGEMENT AND BUDGET, <http://earmarks.omb.gov/earmarks-public/> (last updated Nov. 12, 2010) (describing earmarks as “funds provided by the Congress for projects, programs, or grants where purported congressional direction . . . specifies the location or recipient” (emphasis added)). But cf. ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 217 (3d ed. 2007) (explaining that whereas traditionally, “authorizing legislation rarely specified amounts authorized to be appropriated,” the current practice utilizes specific amounts of authorization). Unsurprisingly, the first appropriations bill was much broader, using four lump sums to cover all of the government's expenditures: “\$216,000 for the civil list, \$137,000 for the War Department, \$190,000 to discharge warrants issued by the previous Board of Treasury, and \$96,000 for pensions to disabled veterans.” LOUIS FISHER, *THE HOUSE APPROPRIATIONS PROCESS, 1789–1993*, at 4 (2003) (citation omitted). The Second Circuit recognized the significance of the special nature of appropriations in its decision. See *ACORN II*, 618 F.3d 125 (2d Cir. 2010) (recognizing that, while the bypassing of administrative procedures could conceivably support the notion that a particular piece of legislation is a bill of attainder, the “inference is difficult to draw . . . when a congressional appropriations law is at issue”).

248. See *Hart's Case*, 16 Ct. Cl. 459, 484 (1880) (“The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.”), *aff'd*, 118 U.S. 62 (1886). But see *New York v. United States*, 505 U.S. 144, 167 (1992) (limiting Congress' ability to place conditions on spending for the States by requiring “some relationship” between the conditions placed and “the purpose of federal spending”). Arguably, the case is inapposite, as *New York* had Tenth Amendment implications not present in Congress' appropriations and spending powers vis-à-vis federal agencies and individual organizations; therefore, Congress' appropriations power remains supreme in the non-state regard. See *id.* (raising concerns over federal funds influencing a State's legislative choices).

249. See *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D. Cal. 1945) (observing that the terms and conditions in which Congress makes appropriations “is a matter solely in [its] hands,” compelling compliance by the executive branch and shielding appropriative acts from interference by the judiciary); cf. Ely, *supra* note 200, at 344 (detailing the traditional concerns of an unrestrained legislature in light of a limited executive and judicial branch). In fact, some, such as Raoul Berger, speculated that the Court's expansive “transmutation” of the Bill of Attainder Clause “invaded the policymaking functions of the state and federal legislatures.” See Berger, *supra* note 13, at 356.

250. See Berger, *supra* note 13, at 402–03 (explaining that the purpose of the Bill of Attainder Clause was to preserve the separation of powers, and “not to prevent legislative ‘punishment,’ but to prevent legislative trial” (quoting Ely, *supra* note 200, at 356) (internal quotations omitted)).

propriety of appropriations and their applicability to the general welfare.²⁵¹ It is not a “trial” in the sense of the judicial term, but appropriations committees have the power to summon witnesses and receive testimony in a manner similar to that seen in judicial trials.²⁵² Congress, as a matter of a constitutionally vested right,²⁵³ passes judgment over the worthiness of an appropriative endeavor and, ²⁵⁴ exercising that judgment, similarly has the ability to prohibit funds from reaching certain entities.²⁵⁵

Lovett, however, poses an interesting issue. The case involves a legislative appropriations act that imposed a prohibition similar to the one in *ACORN*.²⁵⁶ To declare that Congress may prohibit *ACORN*’s funding but is prohibited from effectively terminating the employment of potentially treasonous government employees yields two inconsistent outcomes in two similar scenarios.

Two distinctions make the dichotomous reality possible. The first distinction concerns the type of person targeted by the respective statutes—the employees in *Lovett* were individuals, not corporations.²⁵⁷ It has been undeniable since the early Bill of Attainder Clause jurisprudence that *individuals* were intended to be protected from the exercise of what Story might have called the “legislative magistracy.”²⁵⁸ But the separation of powers analysis for attainder becomes confusing with the recognition of corporations as potential subjects of bills of attainder.²⁵⁹ As a matter of

251. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990) (perceiving the “fundamental and comprehensive purpose” of the Appropriations Clause as a means of assuring “that public funds will be spent according to the *letter of the difficult judgments reached by Congress as to the common good*” (emphasis added)).

252. See generally H. COMM. ON APPROPRIATIONS, 111TH CONG., COMMITTEE RULES (2009), available at

http://appropriations.house.gov/index.php?option=com_content&view=article&id=263&Itemid=34 (outlining the procedural privileges of committee members during appropriations hearings, including the summoning of witnesses and the submission of evidence).

253. See generally U.S. CONST. art. I, § 9, cl. 7 (articulating that “[n]o money shall be drawn from the Treasury but in consequence of appropriations made by law”); Figley & Tidmarsh, *supra* note 116, at 1239 (contending that “the Appropriations Clause enshrined this legislative supremacy by vesting the ‘power of the purse’ in Congress”).

254. See, e.g., *Carmichael v. S. Coal and Coke Co.*, 301 U.S. 495, 515 (1937) (explaining that the judgment as to “whether the present expenditure serves a public purpose is a practical question addressed to the law-making department”).

255. See *Richmond*, 496 U.S. at 427. In fact, the use of limitation language, as seen in section 163, is not uncommon in appropriations legislation. See SCHICK, *supra* note 247, at 268, 270 (contrasting the *legitimate* use of limitation language in appropriations laws under House Rule XXI and Senate Rule XVI with the prohibited insertion of substantive law).

256. See *supra* note 199 and accompanying text.

257. *United States v. Lovett*, 328 U.S. 303, 304 (1946).

258. Cf. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (establishing that “[a] bill of attainder may affect the *life of an individual*” and that the legislature’s power in that respect “*over the lives and fortunes of individuals* [was] expressly restrained” (emphasis added)).

259. See *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 346–47 (2d Cir. 2002) (declaring the Bill of Attainder Clause not to be just a personal, individual guarantee and permitting the Clause to be applied to corporations). It is interesting to note that the Second

political reality, individual employees such as the ones involved in *Lovett* do not have the practical ability or need to lobby Congress for appropriations funding; organizations such as ACORN do have such abilities and needs.²⁶⁰ Thus, federal government employees are far less likely to be subjected to the mercy and whims of the complex appropriations process, whereas an organization such as ACORN should be aware of the possibility of defunding.

The second distinction hones in on the legislative process and net effect of the statutes. In *Lovett*, the first step to defunding the employment of the three individuals was Congress generally deeming “subversion” an activity worthy of terminating employment.²⁶¹ Such a general rule, however ad hoc it may have been, was perfectly within Congress’ ambit to generate.²⁶² But the task of specifying who was subversive—a perceivably criminal classification—typically was expected of the judiciary; with criminal laws, the legislature is only permitted to proclaim the overarching rules for society.²⁶³ Instead, Congress usurped the judiciary’s role by deeming Goodwin B. Watson, William E. Dodd, Jr., and Robert M. Lovett as subversives and instituting the penalty of unemployment.²⁶⁴

With *ACORN*, Congress did not legislate a new crime and pronounce ACORN to be guilty.²⁶⁵ Rather, in its general power of eliminating the corrupt use of appropriations,²⁶⁶ it made a deliberate decision to prohibit the use of federal funding. It may have passed judgment to render its decision, and some of that may have entailed accusations of criminal activity, but these are judgments that Congress is permitted to make

Circuit understood the uncertainty of whether this determination was appropriate; aside from citing loose dicta from several Supreme Court decisions and the “implied assumption” that the Clause would apply to corporations in other circuits, the Second Circuit had very little jurisprudential support. *See id.* at 347 (“The applicability of the Bill of Attainder Clause to corporations remains unsettled in every circuit.”).

260. *Cf.* Transmittal from the Congressional Research Service to the House Judiciary Committee (Oct. 30, 2009), available at http://web.lexis-nexis.com/congcomp/attachment/a.pdf?_m=1bce2f7d9c8304140e1d07e1a72d0f92&wchp=dGLbV1b-zSkSA&_md5=05f2f8c680d6e685525c364fd6ade6e1&ie=a.pdf (summarizing ACORN’s activities in Congress to “promote affordable housing and assist the homeless”).

261. *Lovett*, 328 U.S. at 316.

262. *See, e.g., Fletcher*, 10 U.S. (6 Cranch) at 136 (establishing that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society,” and to leave the application of the rules to “other departments”).

263. *See id.*

264. *Lovett*, 328 U.S. at 316.

265. *See* Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009) (preventing the disbursal of federal funds for ACORN). The legislation did not contain any congressional findings of criminal guilt.

266. *See, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990) (endorsing the full use of the appropriations power to check against “corrupt influence and public speculation”).

without the usurpation of judicial authority.²⁶⁷ In fact, permitting the judiciary to control the appropriations process is a greater contravention of the separation of powers than an appropriations bill can be perceived as being invasive of the judicial power.²⁶⁸

C. *The Inapplicability of the Due Process Rationale*

The second conceptual rationale behind the Bill of Attainder Clause is that it serves as an early guarantee of due process.²⁶⁹ This notion is closely intertwined with the separation of powers rationale, but can be distinguished. More specifically, the due process query is whether the courts “need only ask if the manner in which the legislature is attempting to accomplish its purpose is proper.”²⁷⁰ This goes to the heart of Justice Story’s condemnation of the legislative usurpation of the “judicial magistracy.”²⁷¹ Whereas the separation of powers rationale focuses on the usurpation itself as a matter of governmental structure, the due process argument focuses on the protections accorded to an individual.²⁷²

The concept of the Bill of Attainder Clause as a due process guarantee only serves to further the notion that the Clause cannot serve to restrain the Congressional appropriations process in its full exercise, whether through the commission or prohibition of funding. The prohibition against attainder can only extend to situations where “the protections of a judicial trial” would be anticipated for an individual.²⁷³

In the appropriations arena, no process needs to be accorded to private organizations; the discretion of deliberation and “process” is solely vested in the hands of the legislature,²⁷⁴ and Congress can make either a

267. *Id.* at 427–28 (noting that Congress’ determinations regarding appropriations require “difficult judgments”).

268. *See* Figley & Tidmarsh, *supra* note 116, at 1252 (explaining that there is “no warrant” to believe that the judiciary ever had the power to compel an appropriation).

269. *Cf.* Welsh, *supra* note 16, at 102 (proposing that, as “an absolute constitutional prohibition against trial by legislature,” the Bill of Attainder Clause is “a guarantee of process” (citations omitted)).

270. *Id.* at 103–04.

271. *See, e.g.*, STORY, *supra* note 28, § 1344 (describing bills of attainder as a pronouncement of guilt without “any of the common forms and guards of trial”).

272. *Compare* United States v. Brown, 381 U.S. 437, 442 (1965) (viewing the Bill of Attainder Clause as “an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function”), *with* BellSouth Corp. v. FCC, 144 F.3d 58, 74 (D.C. Cir. 1998) (Sentelle, J., dissenting) (explaining that the Bill of Attainder Clause ensured the preservation of “the factfinding and due process protections of trial in an Article III court”).

273. *See* Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 468 (1977) (identifying the legislative determination of guilt and the infliction of punishment “*without provision of the protections of a judicial trial*” as essential elements to make a bill of attainder (emphasis added)).

274. *See, e.g.*, THE FEDERALIST NO. 48, at 253 (James Madison) (Ian Shapiro ed., 2009) (“[T]he legislative department alone has access to the pockets of the people, and has in some

comprehensive inquiry or no inquiry at all as to whether an appropriation should be commissioned or prohibited.²⁷⁵ The Supreme Court has recognized as much and granted an almost-universal deference to Congress in making decisions on appropriations, especially as to who should receive them and for what purpose they should do so.²⁷⁶ As the Court in *Richmond* noted, it is for Congress to reach the “difficult judgments . . . as to the common good,” and the appropriations process should not be left to “the individual favor of Government agents or the individual pleas of litigants.”²⁷⁷

But much like the issues raised by *Lovett* with respect to the separation of powers rationale, it is unclear how the three employees in that particular case fell outside the appropriative realm, thereby justifying constitutional intervention by the due process rationale of the Bill of Attainder Clause. After all, it can easily be said that the Urgent Deficiency Appropriations Act of 1943 merely served to prohibit funds, used for the general welfare, from going to suspected subversive individuals.²⁷⁸

The key in distinguishing *Lovett* from cases like *ACORN* is that individuals are not the immediate beneficiaries of Congressional appropriations²⁷⁹ and are not expected to be part of its process as recipients.²⁸⁰ In rescinding and placing conditions on appropriations,

constitutions full discretion”); *see also* *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D. Cal. 1945) (observing that the judiciary is forbidden from interfering with “the exclusive powers of Congress” in appropriation matters and that the executive is compelled to comply with Congress’ exercise of such powers).

275. *Cf. United States v. Realty Co.*, 163 U.S. 427, 440–41 (1896) (explaining that Congress is the only branch of government where “any application [of claims and debts may] be successfully made” and an entity’s “recognition depends solely upon congress, and whether it will recognize claims thus founded *must be left to the discretion of that body*” (emphasis added)).

276. *See, e.g., Carmichael v. S. Coal and Coke Co.*, 301 U.S. 495, 515 (1937) (declaring inquiries as to “whether [an] expenditure serves a public purpose [to be] a practical question addressed to the law-making department,” and requiring “a plain case of departure from every public purpose . . . to justify the intervention of a court”); *see also* John W. Brabner-Smith, *Judicial Limitations on Federal Appropriations*, 25 VA. L. REV. 659, 661 (1939) (hypothesizing that the Court’s intervention in matters of appropriations would “suspend[]” and “disorganize[]” the entire appropriations process).

277. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990).

278. *See United States v. Lovett*, 328 U.S. 303, 306 (1946) (referring to the federal government’s argument that the appropriations ban was a valid exercise of the “general Welfare” phrase of the Appropriations Clause).

279. *But see* Priv. L. No. 100-38, §§ 1–2, 102 Stat. 4860, 4860–61 (1988) (granting sums to individuals totaling \$101,622). Even under such rare circumstances, Congress acts on its own volition to grant an individual an appropriation for the sake of remediating an error or wrong, not to grant an undeserved financial windfall. *See Richmond*, 496 U.S. at 431 (explaining that Private Law 100-38 was passed because the servicemen listed “joined [the] wrong retirement plan in reliance on erroneous advice”).

280. In theory, there is no explicit bar to individuals being the recipient of appropriations. After all, the early American tradition “was to adjudicate each individual money claim against the United States”. *Richmond*, 496 U.S. at 430. However, there are several suggestions that such a prohibition is now in place. First, with respect to the

Congress cannot implicate actors who otherwise would not play any role in Congress' funding of the general welfare. Further, the appropriations power in *Lovett* was used to prevent the three individuals from practicing their profession as employees of the United States government; this is a deprivation of a right to property—specifically, employment—that the Court has strongly recognized as one that is to be protected by judicial process.²⁸¹ In contrast, when such liberties are not at stake, courts have been extremely hesitant to inject themselves into the process of congressional appropriations.²⁸²

Through the Bill of Attainder Clause, the Framers intended to protect individuals from the capricious whims of legislatures wishing to impose a punishment that could only otherwise be accorded through a judicial trial.²⁸³ The Clause was not meant to inject judicial notions of due process into processes where a judicial trial would be constitutionally unwarranted.²⁸⁴

Due process is only invoked through the Bill of Attainder Clause in cases where, absent laws involving the deprivation of life or liberty,²⁸⁵

Constitution, the related Spending Clause suggests that Congress must “provide for the common Defence and *general Welfare* of the United States.” U.S. CONST. art. I, sec. 8, cl. 1. (emphasis added). Second, case law seems to validate the notion that the Court will defer to Congress on spending matters, so long as the power is being used for the sake of the general welfare. See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (delineating Congress’ “authority under the Spending Clause to appropriate federal moneys to promote the *general welfare*” (emphasis added)); *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (agreeing with the Hamiltonian view that “Congress . . . has a substantive power . . . to appropriate, limited only by the requirement that it shall be exercised to provide for the *general welfare* of the United States” (emphasis added)). Finally, practical considerations and a look to the current operation of the appropriations process seems to suggest that even within the scope of earmarking, the process promotes spending for organizational projects, not appropriations to individuals. Cf. SCHICK, *supra* note 247, at 245, 247 (providing examples of home district projects requested through the earmarking process in a 2006 appropriations bill and instructing earmark requesters to identify recipient *organizations* in their requests).

281. See *generally* *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (discussing the prohibition of employment as a priest without a loyalty oath as a bill of attainder and a deprivation of property in the form of employment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (discussing the same in the context of employment as an attorney).

282. See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (explaining that the inquiries to the “wisdom or unwisdom” of a congressional scheme of benefits “must come from Congress, not the courts”); *id.* at 617 (warning that “[j]udicial inquiries into Congressional motives are at best a hazardous matter”).

283. See STORY, *supra* note 28, § 1344 (illustrating occasions where the legislature would pass bills of attainder “in times of rebellion . . . or [] violent political excitement” and in doing so, would be most vulnerable to “tramp[ing] upon the rights and liberties of others”).

284. Cf. *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 725 (1951) (Frankfurter, J., concurring in part, dissenting in part) (arguing that the Due Process Clause, working in conjunction with the Bill of Attainder Clause, does not give “an unwarranted power of intrusion into local affairs” where a local government makes decisions of employment in part by inquiring about political affiliation).

285. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473–74 (1977).

Congress legislatively deprives an individual of his property²⁸⁶—and by extension, his livelihood.²⁸⁷ In those instances, an individual should enjoy “the common forms and guards of trial” and be able to answer against the reasons motivating such deprivation in an environment where the “formality of proof” is required “in the ordinary course of judicial proceedings.”²⁸⁸ But the Constitution recognizes no role for the judiciary to play in the deliberation of appropriations;²⁸⁹ therefore, the protections that accompany a judicial trial are similarly inapplicable when Congress makes its appropriative decisions.²⁹⁰ It is hard to imagine that the deprivation of congressional appropriations, arguably a “noncontractual government benefit,” can be deemed a deprivation of property barred by the Bill of Attainder Clause.²⁹¹ Moreover, even if the protections of a trial were available to determine whether the withdrawal of appropriations was lawful, a court would be powerless to compel Congress to provide a remedy in re-appropriating funds.²⁹² Thus, it is appropriate to conclude that the limited due process rationale behind the Bill of Attainder Clause reveals that the Clause was not meant to constrain the congressional appropriations power.

1. *Counterpoint: preventing attainder by demanding congruence and proportionality*

Interestingly, the *ACORN* appeal’s academic amici, in advocating for a strong functionalist approach, call for the adoption of a standard of review

286. *Id.* at 474 (explaining that the “punitive confiscation of property” is prohibited by the Bill of Attainder Clause).

287. *E.g.*, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866) (declaring that a clergyman’s deprivation of employment through the imposition of a loyalty oath is “within the inhibition of the Federal Constitution”); *see also* *United States v. Lovett*, 328 U.S. 303, 316–17 (1946) (announcing that the Constitution does not permit Congress to sentence individuals “to perpetual exclusion from any government employment”).

288. *See* STORY, *supra* note 28, § 1344 (condemning the legislature’s assumption of the “judicial magistracy” as an “irresponsible despotic discretion”).

289. *See* *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990) (explaining that the “difficult judgments . . . as to the common good” and the spending of “public funds” is reached by Congress); *Hart’s Case*, 16 Ct. Cl. 459, 484 (1880) (placing absolute control of public funds in the hands of Congress, noting that “Congress is responsible . . . only to the people”), *aff’d*, 118 U.S. 62 (1886).

290. *See* *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 515 (1937) (leaving the appropriative decision-making process entirely to Congress as a “practical question addressed to the lawmaking department”); *cf.* *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (deeming judicial inquiries of congressional motives “a hazardous matter”).

291. *See* *Flemming*, 363 U.S. at 609–10 (observing that social security benefits are noncontractual government benefits); *id.* at 617 (expressing that “the mere denial of a noncontractual governmental benefit” is not a punishment that runs afoul of the Bill of Attainder Clause).

292. *See* *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (explaining that even if there is a claim or judgment against the United States, if Congress has not made an appropriation, then the claim “cannot and should not be paid by the Treasury”).

akin to the congruence and proportionality test applied in *City of Boerne v. Flores*²⁹³ in lieu of the rational basis approach.²⁹⁴ The amici have substantial jurisprudential support for their position, relying on legal conclusions made by the United States Court of Appeals for the District of Columbia Circuit²⁹⁵ as well as dicta from the Supreme Court's more recent attainder jurisprudence.²⁹⁶ The scholars' standard would make the mere existence of a nonpunitive rationale insufficient to satisfy the attainder inquiry as they claim the "nonpunitive purpose must *itself* support the singling out of the targeted individuals or groups."²⁹⁷

Harmonizing an attainder analysis with a congruence and proportionality test certainly has its appeal. It would ensure that Congress, in passing bills targeted at specific individuals or groups, would have to demonstrate a legitimate, nonpunitive purpose that outweighs the magnitude of the burden imposed, thus requiring some form of "legislative" process.²⁹⁸

Unfortunately, when applied to bills involving congressional appropriations (or the withholding thereof), the congruence and proportionality test is unfeasible, if not unconstitutional.²⁹⁹ Subjecting appropriative legislation to this level of judicial scrutiny would intrude upon the province of Congress; the legislature alone has the discretion to determine whether "wisdom or unwisdom" resides in its appropriative decisions.³⁰⁰ Only when the *legislature* clearly imposes a traditionally

293. 521 U.S. 507 (1997). The congruence and proportionality test, as established in *Boerne*, dealt with Congress' enforcement powers under section five of the Fourteenth Amendment. *See id.* at 519. Because Congress' power under section five was limited to remedial measures, the Court required legislation enacted through Congress' section five power to have "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519–20.

294. Brief for Amici Curiae, *supra* note 200, at 14–15.

295. *Id.* ("[C]ourts require the government to show 'the need for a legitimate nonpunitive purpose and a rational connection between the burden imposed and [the] nonpunitive purposes of the legislation.'" (second alteration in original) (quoting *Foretich v. United States*, 351 F.3d 1198, 1221 (D.C. Cir. 2003))).

296. *Id.* at 15 ("In such cases [involving the Bill of Attainder Clause], [courts] look beyond simply a rational relationship of the statute to a legitimate public purpose for 'less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives.'" (quoting *Con. Edison Co. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002))).

297. *Id.* at 16.

298. *See id.* at 17 (explaining that if there is a "significant imbalance between the magnitude of the burden imposed and a purported nonpunitive purpose, the statute . . . is . . . an unconstitutional bill of attainder" (quoting *Foretich*, 351 F.3d at 1221)).

299. *See Carmichael v. S. Coal and Coke Co.*, 301 U.S. 495, 515 (1937) (requiring that judicial intervention in appropriative matters contain a prerequisite of "a plain case of [legislative] departure from every public purpose which could reasonably be conceived"—arguably, a rational basis standard (emphasis added)); *see also Smith v. Government of the Virgin Islands*, 329 F.2d 135, 143–44 (3d Cir. 1964) (observing that the "plain case of departure" standard established in *Carmichael* is a "well-settled principle[]" of law).

300. *See Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (declining to evaluate the "wisdom or unwisdom" of Congressional deprivations of social security, concluding that

judicial form of punishment should judicial due process be afforded.³⁰¹ A *Boerne*-type scrutiny is also unpalatable when comparing the history and treatment of section five of the Fourteenth Amendment to the Appropriations Clause; section five is limited in scope and Congress must take caution not to exceed its discretion under it,³⁰² whereas Congress has been accorded near limitless deference in its appropriative decisions.³⁰³ Thus, as tempting as the employment of a congruence and proportionality test is to ensure some semblance of process, such a standard of scrutiny is incompatible with the deference owed to the legislature.

D. A More Specific Purpose: Returning to the Originalist Interpretation

With the current test in disarray, and the doctrines of separation of powers and due process supporting the notion that the Bill of Attainder Clause was not meant to constrain the appropriations power, there is only one analytical structure that the Court could employ to properly assess further challenges based on the Bill of Attainder Clause. This mode of analysis does not require reinvention, but rather the contemporary choosing of a side; by returning to Justice Frankfurter's test that treats the Bill of Attainder Clause as a "very special" constitutional organism, the constitutional "collision" feared by the literalists can be avoided.³⁰⁴

Admittedly, the precise contours of Justice Frankfurter's approach have not been fully defined. However, his judicial philosophy makes clear that a true bill of attainder requires at least three elements: the specification of both an offense and an individual,³⁰⁵ a declaration of guilt,³⁰⁶ and

"[t]he answer to such inquiries must come from Congress, not the courts" (quoting *Helvering v. Davis*, 301 U.S. 619, 644 (1937)) (internal quotation marks omitted)).

301. *E.g.*, *United States v. Lovett*, 328 U.S. 303, 318 (1946) (declaring a statute that effectively denied three individuals the right to paid employment is an unconstitutional bill of attainder); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 316, 332 (1866) (striking down a Missouri statute requiring an anti-Confederate loyalty oath to practice a vocation and be gainfully employed).

302. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (explaining that the Fourteenth Amendment's history supports the idea that the Enforcement Clause was intended to be used as a limited, remedial device, rather than as a means of changing the substance of constitutional rights).

303. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990) (explaining that the Court defers to Congress "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good").

304. *See Lovett*, 328 U.S. at 319, 322 (Frankfurter, J., concurring) (identifying a "very special, narrowly restricted, intervention by the legislature" as the evil of which the Constitution sought to proscribe through the Bill of Attainder Clause).

305. *See Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961).

306. *See Lovett*, 328 U.S. at 322–23 (Frankfurter, J., concurring) (observing that traditionally, a bill of attainder always contained "a declaration of guilt either of the individual or the class to which he belonged").

punishment for a *past* offense.³⁰⁷ This set of guidelines maintains the separation of powers by reserving the conduct of trials to our judicial system, leaving the legislature to promulgate the rules that courts may interpret to deem offense and punishment.³⁰⁸ Moreover, it conforms more closely with the notion that the Framers, in adding the Bill of Attainder Clause to our Constitution, knew exactly what bills of attainder actually were meant to be,³⁰⁹ and did not intend to pit one constitutional provision against the other.³¹⁰

Absent from the originalist dialogue, however, is proper consideration of what *could* constitute “punishment” as prohibited by the Bill of Attainder Clause. *ACORN* has properly demonstrated how the functionalist definition of “punishment” can stretch too far and infringe upon a constitutionally vested power that the Court repeatedly has recognized to be solely within Congress’ ambit.³¹¹ But little has been said about what the proper scope of punishment is under the literalist approach. In response to Ely’s initial observations regarding the Bill of Attainder Clause, Professor Raoul Berger suggested a radically literal interpretation limiting the punishment aspect of the Clause to include only those resulting in death.³¹² This, however, seems entirely incongruent with the most fundamental principles of the Court’s interpretation of the Clause,³¹³ and moreover, seems unreasonable in light of the separation of powers arguments.³¹⁴

307. See *id.* at 323 (connecting the Bill of Attainder Clause to the Ex Post Facto Clause and explaining that the function of both was to prevent punishment for *past* offenses).

308. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (tasking the legislature with the prescription of “general rules for the government of society” while leaving the interpretation of such laws to “other departments”).

309. See, e.g., *Lovett*, 328 U.S. at 321 (Frankfurter, J., concurring) (explaining that the nature of the Bill of Attainder Clause was very specific, and “[t]hese specific grievances and the safeguards against their recurrence were not defined by the Constitution” but “by history”); *Green v. Shumway*, 39 N.Y. 418, 430–31 (1868) (Mason, J., dissenting) (emphasizing that the Framers understood the “established and technical signification” of bills of attainder within the unique framework of the Constitution); see also Berger, *supra* note 13, at 361 (examining Justice Story’s constitutional commentaries for inferences that the Framers wrote the Constitution with common law constructs, including those concerning attainder, in mind).

310. See *Lovett*, 328 U.S. at 319 (Frankfurter, J., concurring) (“[E]very rational trail must be pursued to prevent collision between Congress and Court.”).

311. See discussion *supra* Part III.B (analyzing the unconstitutional effects of attempting to restrain the congressional appropriations power with the Bill of Attainder Clause).

312. See Berger, *supra* note 13, at 364 (rejecting the idea that the Framers would employ the phrase “bills of attainder” to include the “quite different ‘bills of pains and penalties’”).

313. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866) (“Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.”); *Fletcher*, 10 U.S. (6 Cranch) at 138 (noting that a bill of attainder may impact “the life of an individual, or may confiscate his property, or may do both”); see also *Drehman v. Stifle*, 75 U.S. (8 Wall.) 595, 601 (1869) (describing the Bill of Attainder Clause as “generic[al] and embrac[ing] bills of both [pains and penalties and attainder] classes”).

314. Even Justice Frankfurter recognized that the Bill of Attainder Clause enshrined the divorce of the judicial function from the legislative branch, and recognized that as such,

Rather, the proper scope of punishment should be limited to “historical punishments” traditionally meted out by the judiciary, encompassing both bills of attainder and bills of pains and penalties.³¹⁵ Such punishments include imprisonment,³¹⁶ banishment,³¹⁷ the punitive confiscation of property,³¹⁸ and a bar to employment.³¹⁹ This would address the functionalist concern that a hyper-technical interpretation of the Clause would “outmode” the necessity of the Clause,³²⁰ which should serve as a meaningful restraint of legislative power³²¹ while preventing unconstitutional intrusion into the domains of other branches.³²²

Advocates of the more expansive, functionalist approach, such as Professor Ely, question whether the literalist approach is viable.³²³ Ely contends that any attempt to ground the attainder clause in history would lead to an “abortive” endeavor, and had the Framers truly intended to constrain the attainder clause with history’s definition, they would have done so by giving the term bill of attainder “specific content.”³²⁴ A functionalist Court would likely agree.³²⁵

However, the separation of powers guarantee that Ely and others seek through their expanded view of the Bill of Attainder Clause also would

“[t]he Constitution outlaws this entire category of [bills of attainder and bills of pains and penalties].” *Lovett*, 328 U.S. at 324 (Frankfurter, J., concurring).

315. *E.g.*, *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473–75 (1977) (elaborating on the historical definition of punishment and providing examples of traditional punitive measures under the Bill of Attainder Clause).

316. *Id.* at 474.

317. *In re Yung Sing Hee*, 36 F. 437, 439 (C.C.D. Or. 1888) (“A legislative act which undertakes to inflict the . . . banishment or exile from the United States on a citizen thereof . . . is a bill of attainder”). *But see* *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (rejecting the concept that deportation is punishment for a crime, explaining that “[i]t is not a banishment . . . but a method of enforcing the return to his own country of an alien”).

318. *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984).

319. *Nixon*, 433 U.S. at 474 (“Our country’s own experience with bills of attainder resulted in the addition of another sanction . . . : a legislative enactment barring designated individuals . . . from participation in specified employments or vocations . . .”).

320. *See* *United States v. Brown*, 381 U.S. 437, 442 (1965) (expressing concern over the narrow, technical interpretation of the Bill of Attainder Clause and explaining that the Clause was not designed to be “outmoded” quickly after its inception).

321. *See* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (restraining the legislature from passing bills of attainder that “affect the life of an individual, or . . . confiscate his property, or . . . do both”).

322. *See* discussion *supra* Part III.B (using the *ACORN* case to demonstrate the potential clash between the Congressional appropriations power and the Bill of Attainder Clause under an expansive, functionalist approach).

323. *See generally* Ely, *supra* note 200, at 340–43 (explaining the impossibility of the Frankfurterian approach).

324. *Id.* at 342.

325. *See, e.g.*, *Brown*, 381 U.S. at 442 (“The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition . . .”).

include a danger of creating new issues of supremacy.³²⁶ Combined with the fact that other constitutional guarantees can protect individual citizens from the concerns that motivate such an expansive interpretation,³²⁷ there is an extant need to steer the attainder laws back to a path of originalism, literalism, and strict interpretation.

CONCLUSION

If anything is certain about the intent and proper interpretation of the Bill of Attainder Clause, it is that much uncertainty still exists. Interjecting the Appropriations Clause into the attainder analysis suggests that the current interpretations are unreliable, at best. But keeping the attainder doctrine on its current path will resolve nothing; at its core, it is an awkward compromise between two polarized, irreconcilable approaches. Our interpretation of this sparsely used, yet integral, provision of the Constitution is in true need of revision; the only viable reconciliation is to restore and refine the originalist, Frankfurterian interpretation of the Bill of Attainder Clause.

As for ACORN itself, Congress acted properly in withdrawing its funding and prohibiting additional federal funds from reaching the group. In terms of responding quickly (and perhaps irrationally) to a political crisis, section 163 may have been the sort of knee-jerk, penal legislation that the Framers intended to prohibit.³²⁸ Politically and socially, penalizing ACORN may not have been the right thing to do.³²⁹ However, *as a matter of law*, Congress had an absolute right to prevent federal funds from reaching ACORN.³³⁰

James O’Keefe and Hannah Giles, in their politically motivated endeavor, accomplished what they sought—the downfall of a public

326. See discussion *supra* part III.B.

327. *E.g.*, *United States v. Lovett*, 328 U.S. 303, 326 (1946) (Frankfurter, J., concurring) (observing that the Bill of Attainder Clause is “only one of the safeguards of liberty in the arsenal of the Constitution” and that “other provisions . . . specific and comprehensive, [are] effectively designed to assure the liberties of our citizens”).

328. See STORY, *supra* note 28, § 1344 (noting that during instances where the legislature faces “political excitements,” it is most likely to “trample upon the rights and liberties of others”).

329. See John Atlas, *ACORN Vindicated of Wrongdoing by the Congressional Watchdog Office*, HUFFINGTON POST (June 15, 2010, 2:41 AM), http://www.huffingtonpost.com/john-atlas/acorn-vindicated-of-wrong_b_612265.html (discussing the validity, or lack thereof, of accusations made regarding ACORN’s mismanagement of funds). See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-648R, PRELIMINARY OBSERVATIONS ON FUNDING, OVERSIGHT, AND INVESTIGATIONS AND PROSECUTIONS OF ACORN OR POTENTIALLY RELATED ORGANIZATIONS (2010) (finding no major issues with ACORN’s use of federal funding).

330. See discussion *supra* Part III.B.

interest group they perceived as their enemy.³³¹ But in what seems to be a bittersweet coda for ACORN, the authenticity of the duo's work has been heavily challenged.³³² Still, the legacy of the scandal remains. Perhaps ACORN suffered a "social taint" of sorts, but it is not a stigma that the Constitution, with its Bill of Attainder Clause, guards against.

331. See Larry Neumeister, *'We're On Life Support,' Says ACORN Chief Outside Court, As U.S. Fights Funding Ruling*, ASSOCIATED PRESS (Apr. 20, 2010, 9:25 PM), http://www.cleveland.com/nation/index.ssf/2010/04/were_on_life_support_says_acor.html (describing ACORN's precarious financial situation in the aftermath of the O'Keefe scandal).

332. See, e.g., CAL. DEP'T OF JUSTICE, *supra* note 145, at 8–9 (examining the controversy surrounding the deceptive editing of the released ACORN videotapes).